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CURRENT EVENTS.

LIBELLING A WIFE.—All along the line of English speaking and common law peoples there has been a steady improvement in the legal *status* of married woman, but it seems that, in some respects, the old original mother country lags behind the rest of the family. The *Solicitor's Journal* of London in a recent issue, comments upon a ruling which well illustrates this proposition. It seems that the parties in question after living together as man and wife separated, and the woman supported herself by her own labor as a vocalist. The man published what, for the purposes of the case, was conceded to be a defamatory libel, to the effect that the woman was not his wife at all, but had been his mistress. She applied for a rule for a criminal proceeding against her husband for the libel, but the court discharged the rule upon the ground that a criminal proceeding for libel, is not "a proceeding for the protection and security of the separate property" of the wife, and that this latter was the only "proceeding" which under existing laws, a wife can institute against her husband. The "fair fame" of the applicant was not, according to the ruling of the learned judges, her "separate property," nor indeed does it appear that they considered it property at all. Shakespeare says, it is "the immediate jewel of our souls," but whether Shakespeare is authority in English courts we cannot presume to say. Certain it is, that in its most prosaic sense "fair fame,' is recognized by the courts as property, for of the good will of a business, which is fully recognized as property, the good character of the tradesman is the most valuable and indispensable constituent. *A fortiori*, is this the case when a woman is engaged in business. A milliner's trade may be ruined by charges, not that she makes "frightful" bonnets, but that she is personally impure; a school-room would be promptly denuded of its pupils by a like charge against the school-mistress.

These self evident propositions do not seem to have occurred to the English judges in the case under consideration. In defining the words "separate property" they limit their meaning to the actual tangible material chattels. The silks, and ribbons, and laces, in he case of the milliner; the piano, and the harp, the globes and the black-board in the case of the school-mistress, constitute the separate property, and *all of it*. The fair fame which secures customers to one of these business women, and the confidence of parents and guardians to the other, seems to be ignored as too evanescent and immaterial for judicial cognizance.

There is a further ruling which is, at the least, questionable. If the wife had any remedy against the husband, which is *not* conceded, it must be a civil remedy, because the law gives her only a remedy against the husband for the "protection and security" of her separate property, and a criminal proceeding for libel cannot be regarded as such a remedy, for it is designed only to punish the offender not to protect and secure the party injured. This idea brings us back to first principles. What is the object of punishing crime?

Not to revenge certainly, but the prevention of like offences in the future. "My Lord," said a prisoner, "you surely wont hang me for only stealing a sheep?" "Not at all," replied the judge, "but only that sheep may not be stolen." The husband in this case might well have been punished for libelling his wife, so that he should do so no more, which would tend at least partially to secure and protect the wife's separate property in her good name, as well as deter other husbands from committing the like crime.

It appears therefore that it is the law in England that a married woman living with her husband may, with him, prosecute any person who libels her; if her husband has abandoned her, she may prosecute any person who has libelled her *except him*, and that he after withdrawing his protection from her, may say anything against her he chooses, no matter how false calumnious and disgraceful; he may say such things orally, or in writing, or in print; he may say them every day of his life as long as he may live, and he may thus drive her to starvation, beggary, and shame, and for this the law gives her no remedy and inflicts no punishment on him.

If this is the net result, in this respect, of the recent woman law legislation of England, it is very manifest that the mother country is yet very far from having done justice to woman.

TABLES OF CASES.—In our last issue we published a communication very seriously questioning the utility of the alphabetical tables of cases cited, which are so generally appended to legal text-books. We insert in this number a letter on the other side of the question. The writer insists that the table of cases is not merely a convenience but almost or quite necessary for the use of a text-book and protest against any movement in the profession looking to its discontinuance. We are fully satisfied that the practice of inserting such tables in text-books is fully approved by a very large majority of the members of the bar; that the omission of such tables would be regarded by most purchasers of law books as a capital defect, and that neither authors nor publishers can safely deviate from what must now be regarded as a fully established custom. The matter is not an open question.

Our correspondent makes two suggestions, one of which we approve and from the other we are constrained to dissent. He says: "I cannot see why the table of cases should give the volumes in which the cases are reported. One who uses the table knows before-hand where the case he has in mind is reported. Even if he does not, he can turn in a moment to the proper page of the book to ascertain."

We think that if the thing is worth doing at all, it is worth doing well, and the author in preparing the table of cases, should save the trouble of any further reference. A citation in a table of cases should be at least as full as this—"Betts v. Bagley, (12 Pick. 572), 419." If the inquirer knows only the name of the case, by referring to it in the table he finds out at one glance where it was reported, and where it was cited.

We fully concur with our correspondent in his suggestion that on the head line of every page of the index should be shown whether the figures refer to sections or pages.

NOTES OF RECENT DECISIONS.

ALASKA—INDIAN COUNTRY.—We have been favored by a correspondent with a newspaper report of a very recent case decided May 1, 1886, in the United States Circuit Court for the District of Oregon, in which the legal *status* of Alaska is judicially defined. The case was this: Charles Kie is an aboriginal Alaskan Indian, a member of the Thlinket tribe, a nomadic race who frequented, rather than inhabited, the coast of Alaska some eighty miles north of Sitka. Kie became jealous, and having evidence of his wife's infidelity which to his mind was "strong as proof from holy writ," or stronger perhaps, as he is an heathen, he played the Othello, and put to death his dusky Desdemona, but in strict accordance with the laws and customs of his tribe, which have been in force from time immemorial. He was seized, however, by the strong arm of justice, was indicted in the United States District Court for Alaska, was convicted of manslaughter and sentenced to ten years imprisonment, and a fine of one hundred dollars. The case was brought up by writ of error to the United States Circuit Court for the District of Oregon.

In that court, as in the trial court, the defense offered was that neither court had any jurisdiction, because the homicide was committed within the territory of the Thlinkett tribe of Indians; that that territory was Indian country within the meaning of the act of Congress of 1834; that, under that act,[1] the courts of the United States can take no jurisdiction of crimes committed by one Indian against the person or property of another Indian within the "Indian country."

The questions were, therefore, what is the Indian country, and whether Alaska is Indian country.

In June, 1834, an act of Congress was passed declaring that "all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any State, to which the Indian title has not been extinguished, shall, for the purposes of this act, be taken and deemed to be the Indian coun-

[1] Rev. Stat. U. S., § 2146.

try."[2] The foregoing is the first section of the act (ch. 161), and those which follow regulate the intercourse of the whites with the Indians inhabiting the Indian country. Section 25 contains the proviso in question in the case under consideration, that the jurisdiction of the United States should not extend to crimes committed by one Indian against the person or property of another Indian within the Indian country.

Notwithstanding the immense changes which have taken place within the vast region covered by the act of 1834, by the extinction of Indian titles, the creation of States, and the formation of territorial governments, Congress has not thought it necessary to make any new definition of "Indian country." The Supreme Court, however, has supplied the deficiency by a ruling in 1877. Construing the act of 1834 the court says: "The simple criterion is that as to all the lands thus described, it was Indian country whenever the Indian title had not been extinguished, and that it continued to be Indian country so long as the Indians had title to it and no longer. As soon as they parted with the title, it ceased to be Indian country without any act of Congress.[3]

In an earlier case,[4] the same rule was applied that lands were Indian country as long as the Indians had title to them, and ceased to be Indian country when the Indian title was extinguished. In a later case in 1883,[5] the opinion delivered by Mr. Justice Miller in Bates v. Clark[6] is re-affirmed, the court adding: "In our opinion that definition now applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupation of Indians, although much of it has been acquired since the passage of the act of 1834."

The conclusion from these cases would seem to be inevitable, that wherever within the territory belonging to the United States in its sovereign capacity, Indian tribes hold the customary Indian occupancy title it is Indian country, within the meaning of the act of Congress of June 30, 1834, and that consequently within such territory so held by Indian tribes by an occupancy title, the courts of the United States have no jurisdiction of crimes committed by one Indian against the person or property of another Indian.

On the other hand, the ruling in the case under consideration that the Indian territory in Alaska is not "Indian country" within the meaning of the act of 1834, and consequently that Federal courts had jurisdiction over crimes committed against each other by the natives, is supported upon the authority of a series of rulings of the United States Circuit Courts on the Pacific coast. In the case of the United States v. Seveloff,[7] the ground is taken that the "Indian country" is only that portion of the country which has been declared to be such by an act of Congress, and consequently that in the sense of the act of 1834 there is no "Indian country" which did not belong to the United States, as a sovereignty, at the passage of that act; and therefore after-acquired territory occupied by Indians, was not Indian country. The court in the case under consideration calls attention to the fact that the Crow Dog case,[8] concerned territory acquired from France in 1803, from which we may infer that the *dictum* in that case concerning the application of the act of 1834 to after-acquired lands was regarded by the circuit court as merely *obiter*. And there is some reason in this, for there seems to have been no case adjudged by the Supreme Court of the United States in which the act of 1834 is, in the respect of the jurisdiction of Federal courts, applied to any territory occupied by Indians, of which the United States was not the sovereign in 1834. If, therefore, notwithstanding the *dicta* in Bates v. Clark and *Ex parte* Crow Dog,[9] the act of 1834 may be held to apply only to the territory then possessed by the United States, the question is still an open one, and the Circuit Court of the United States for the District of Oregon was at liberty to follow the rulings made in

[2] 4 U. S. Stat. at Large, p. 729.

[3] Bates v. Clark, 109 U. S. 204.

[4] United States v. Forty-three Gallons of Whisky, 93 U. S. 188.

[5] *Ex parte* Crow Dog, 109 U. S. 556.

[6] *Supra.*

[7] 2 Sawy, C. C., 311.

[8] 109 U. S., 556.

[9] *Supra.*

the case of The United States v. Seveloff,[10] and other cases which followed it.[11]

One point, however, made by the court in the case under consideration, we think amounts to little or nothing. That is, that on March 3, 1873, an act was passed by Congress prohibiting the introduction of spirits into Alaska. The court regards this act as a legislative recognition of the fact that Alaska was not "Indian country," and therefore applied to it the prohibition which, if it had been Indian country would have been in force by virtue of the act of 1834. The act of 1873 may, however, be regarded as merely declaratory, and its object to secure the enforcement, in Alaska, in the matter of spirituous liquors, of the act of 1834. Or it may be, as the court in the case under consideration assumes that it was, an act to extend into Alaska a regulation that had been found salutary elsewhere. The presumption, either way, is of little value as an element of judicial considerarion.

Probably the strongest ground upon which the ruling in this case can be sustained is, that it does not appear that the Indians had even the feeble occupancy title to lands, recognized by either Russia or the United States. The former government, we are told, held the whole country, and it does not appear that it ever recognized any right or title to land as existing in the aborigines. The United States has made no treaties with any of the tribes, or recognized any boundary lines between their supposed possessions and those of the white people. It would be rather hard to predicate the idea of an Indian country upon the supposed occupation of tribes of savages whose movements are as uncertain as those of a flock of pigeons. It would seem that the idea of an "Indian country" as used in the act of 1834 was based upon antecedent treaties and fixed boundaries, but as far as appears from the several cases we have examined, there were neither treaties with Alaskan Indians nor boundaries, no element of possession by one race or exclusion of the other.

[10] 2 Sawy. C. C., 311.

[11] *In re* Carr, 3 Sawy. C. C. 317; Waters v. Campbell, 4 Sawy. C. C. 121; United States v. Stephens, 8 Sawy. C. C. 117.

ADMINISTRATION ON THE ESTATE OF LIVING PERSONS.

The Supreme Courts of Pennsylvania,[1] Illinois,[2] Tennessee,[3] Wisconsin,[4] South Carolina,[5] California,[6] and the U. S. Circuit Court for the Southern District of New York,[7] have held, that letters so issued are absolutely void, and that a sale of property there-under passes no title to a *bona fide* purchaser. The New York Court of Appeals,[8] seems to stand alone in holding such letters valid, and all acts done under them, good, before revocation by the court that issued them.

With such an array of authorities on one side, and only one on the other, and that made by four judges against three, I would not think it worth while to write an essay on the question, did it not seem so plain to me that the New York case was right, and all the others wrong. Where the issuing or confirmation of letters of administration is a judicial act, as it is in most, or all of the States, but two questions can arise. (1) Did the court have jurisdiction over the "subject matter," and (2) did it have jurisdiction over the person? If it did possess both, then its decision is valid until set aside, but if it lacked either one, then its decision is void. All of these cases holding the letters absolutely void, hold that the fact of death is the subject matter that must exist before the court can take jurisdiction; and some of them also hold, that the person being in fact alive, his rights can not be interfered with, without due notice according to law, and that the decision is also void for want of notice. It looks to me, as though they are radically wrong on both points.

The Illinois Court in Thomas v. People, *supra*, said: "Jurisdiction, in the general and most appropriate sense of that term, as applied to the subject matter of a suit at law or in equity, is always conferred by law, and it is a fatal error to suppose the power to decide in any case, rests solely upon the averments in a pleading; * * * there must

[1] Devlin v. Commonwealth, 101 Pa. St. 273.
[2] Thomas v. People, 107 Ill. 517.
[3] D'Arnsment v. Jones, 4 B. J. Lea. 251.
[4] Melia v. Simmons, 45 Wis. 334.
[5] Moore v. Smith, 11 Rich. Law, 569.
[6] Stevenson v. Superior Court, 62 Cal. 60.
[7] Lavin v. Emigrant, etc., 9 Rep. 541.
[8] Roderigas v. East River Savings Bank, 63 N. Y. 160.

be power in the court, conferred by law, to act in a real case of the character of the one supposed by the pleading or complaint, and and if there is not, the whole proceeding, and all acts done under it, would be inoperative and void." The learned judge states that "it is a fatal error to suppose the power to decide in any case rests solely upon the averments in a pleading." This is true only in the sense that the case must be based on something real and not fictitious. There must be a real plaintiff and a real defendant, and a real subject matter for the court to act upon. If any of these things are wanting, then the whole case is a *farce*, no matter what the pleadings allege. In an action of ejectment brought by a fictitious plaintiff, or against a fictitious defendant, or for a parcel of land that does not exist, the judgment would be simply void. When the parties are real, and the subject matter real, then the jurisdiction necessarily depends on the allegations in the pleadings. A paper making certain allegations, and asking for certain relief, is presented to a court. If the court has power by law to grant the relief on proof of those allegations, it must proceed and hear the case. Its power so to do is jurisdiction. Take, for illustration, a case of common occurence. A person disappears; sometime thereafter a corpse is found in the river. The widow and near relatives identify it as that of the missing person. It is buried as such. The supposed widow makes application for letters of administration in due form, duly supported by affidavits of death. What is the court to do? Suppose the court refuses to proceed. The Supreme Court will compel it to do so by writ of mandate. It then proceeds to hear evidence to prove the truth of the allegations contained in the petition. The evidence is all on one side. The relatives and acquaintances all identify the corpse as that of the missing person. Suppose the court still refuses to issue letters; the Supreme Court of any of those States that hold letters issued on a live person's estate void, would reverse the lower court, and order it to issue letters.

It now issues such letters in obedience to the mandate of the Supreme Court, the property is sold, the debts paid, and the estate settled. Now the supposed dead person returns. According to the theory of these courts the whole proceedings are void, and all parties aiding or advising therein are trespassers. I know of nothing in the whole round of the law so absurd. The fundamental error is in assuming that the death of the person is the subject matter of the adjudication, when it is only one point of proof in the hearing of the cause, the same as the allegation that he left property in the county, or debts unpaid, As I said before the test of jurisdiction is this: On the allegations made before the court, can the court, on proof of their truth, grant the relief prayed for? If it can, then it has jurisdiction and must proceed, and hear the evidence, and grant or deny the relief.

The power to proceed and hear, necessarily implies the power to decide wrongly as well as rightly; and such decision, even if wrong, is not subject to collateral attack; it can only be reversed or set-aside by appeal, or review, and all acts done under it, while in force, are valid.

Take the ordinary case of an application for an attachment against the property of a non-resident to recover a debt. What is the "subject matter" of the cause? Is it the fact of non-residence? Certainly not. The subject matter is the property seized on the writ of attachment. One of the vital points necessary to be established, before the sale can be ordered, is the non-residence of the defendant; but no more vital than that there is a just debt due and unpaid; but these are matters of proof, and the court may decide them all wrongly; and yet it does not lose jurisdiction to sell the attached property and pass a good title. On these questions all the courts agree.

What is the difference, on principle, between such a case in attachment, and a case in administration? The proper allegations are made in writing before the court, in either case, and the court must proceed and hear the evidence; the evidence shows the allegations to be true; the court must grant the relief asked.

Why, in the name of consistency, should the sale of one's property under the attachment proceedings be held valid, and under the administration proceedings void? The "subject matter" is precisely alike in both cases, to-wit: that the absent person has left

property within the jurisdiction of the court that should be sold to pay debts. In either case the court, on proper allegations and evidence, issues its writ—in the one case a writ of attachment, and in the other, letters of administration,—seizes the property, sells it, pays the debts, and disposes of the balance as the law directs. But, say some of the decisions, the judgment of the court is void for want of jurisdiction over the person. They say he is, in fact, alive, and his rights cannot be adjudicated upon. without notice to him, and all attempts to do so are void. The same mistake is made here as in regard to the "subject matter." The fact whether a summons or notice of any kind is to be issued, depends on the allegations made before the court. If those allegations show the defendant to be dead, then, of course, no notice of any kind can issue; and when such allegations in regard to death are proven, that shows that the court has jurisdiction to issue process, and grant relief, without notice. The proceedings with reference to the appointment of a guardian for alleged insane persons under the Indiana statute, are analagous to the appointment of an administrator. The Indiana statute[9] provides, that "whenever any person shall, by statement in writing, represent to the court having probate jurisdiction in any county, that any inhabitant of such county is a person of unsound mind" * * such court shall cause such person to be brought before it, and adjudicate that question. Another section of the statute[10] provides that, "If the court shall be satisfied that such person, alleged to be of unsound mind, cannot, without injury to his health, be produced in court, such personal appearance may be dispensed with." This statute allows a person's liberty and property to be taken from him without any notice whatever. The court gets jurisdiction by certain allegations made in an *ex parte* pleading. It issues the letters of guardianship on proof of those allegations. Does any one suppose such letters would be void if in fact the alleged person were not of unsound mind? In Hutts v. Hutts,[11] it was held that where the record did not show that the person of alleged unsound mind was notified, or present in court, that it would be presumed that she was unable to appear, and that the proceeding was valid. The contention in that case was, that the judgment was void for want of notice or appearance of any kind. If a person is insane, of what use is a notice? And if he is in such a state of health that he can not be brought into court what is to be done with his property? Must it go to waste? Common sense would dictate that some one be appointed and qualified as guardian to take care of it; and, under the suppositions just made, the court must proceed and do so, *ex parte*; and this necessarily implies the power to so proceed—when the proper allegations are made—when the person is not, in fact, insane. The case of Thomas v. People,[12] puts this illustration: Suppose a case to enforce a maritime lien in a court of admiralty; in such case a vessel of some kind must be alleged to exist; suppose, in fact, the lien sought to be enforced was on a house on dry land, but the court should go on and order the sale of the premises; the court says the order would be void.

I would suggest, with deference, that the illustration is not analagous. If the libel alleged that the work was done on a house on dry land, it would show a want of jurisdiction on its face; if it alleged that the work was done on a named vessel, it would show a case of jurisdiction, and the court would have to proceed and hear the evidence; If the evidence showed that the building was in fact a house, the court could lawfully proceed no further. If it should order the sale of the house as a house, the order would show the want of jurisdiction for two reasons: 1. It would not follow the issue made by the libel that it was a vessel, and 2: it would show that the court was trying to sell real estate. But if the court should find the building to be a vessel, and order it sold, it would be nugatory for the reason that the marshal could find no such vessel to sell. It would be just as void as though a judgment and writ in ejectment should order the plaintiff to be put in possession of lot No. 100 in a certain town, and there was no such lot. But these illustrations are in no manner analagous to a case for letters of administration. In such cases, the *res*, the things actually exist as described;

[9] R. S. 1881, § 2345.
[10] R. S. 1881, § 2547.
[11] 62 Ind. 214, 220.
[12] *Supra.*

they are seized by the process of the court; they are sold to pay alleged debts. When the proper allegations are made, and the court issues its process and seizes the property described, then it must hear evidence to know what to do with it. To say, as many courts do, that the court has only power to issue letters of administration on the estate of deceased persons, is as fallacious, in my opinion, as to say that the court has only power to render a judgment on a just claim. All that can be said when it does issue letters on the estate of a living person, or render a judgment on an unjust claim, is that it was imposed upon, but not, I submit, that its acts are void.

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THE USE OF CHRISTIAN NAMES IN LEGAL PROCEEDINGS.

The rule that a man may have but one Christian name, for all legal purposes, appears to be coeval with the common law itself. For Lord Coke says: "And this doth agree with our ancient books, where it is holden that a man may have divers names at divers times, but not divers Christian names."[1] And this principle has been recognized and affirmed, with very few exceptions, in all the cases down to the present day. The law knows of but one Christian name; it refuses to recognize a secondary or "middle" name as a constituent part of a man's legal appellation; and therefore the insertion or omission of a middle name, or its initial, is, under any circumstances, immaterial and may be disregarded.[2] It has been suggested, however, that the middle name will be noticed by the law if it is made to appear that its use or omission has occasioned an injury to a different person than the one designed.[3] It would seem to follow from the general rule, that it is immaterial whether a middle initial be introduced which the party is not in the habit of using, or one be omitted which he is accustomed to use, or whether those used by him in writing his name be transposed; in neither case would it amount to a misnomer.[4] So, where a person actually owns land and intends to convey it, and executes a deed, the same is good, although the grantor's name is written in the body of the deed with a different middle initial from the one in the signature.[5] The omission of the initial of a middle name in the appointment of a justice of the peace is not a material variance, and will not invalidate his commission.[6] It follows, also, from the general rule that if the defendant is described by his middle name alone, and the Christian name omitted, the pleading will be bad.[7] But it would undoubtedly be held (though we have never seen the point decided), that if the possessor of two baptismal names is in the habit of abbreviating the first into a mere initial, and writing the second in full, and is known in all his business relations by that designation, he may well be sued by the title so adopted. A rather curious reason for this judicial disregard of initials was given by Judge Redfield in a case decided half a century ago. In fact, the learned judge's language throws a startling light on the very reprehensible manner in which our immediate ancestors are said to have juggled with names and initials. "The law is, I apprehend, well settled in England, that mere initial letters are not to be regarded. Among the Romans their names were so few and uniform, that initial letters were well understood; but it is not so at the present day. These initial letters are assumed arbitrarily by many without representing any name, and when they do, the name is known only to the person or his immediate family; and the letter or letters are transposed or omitted at pleasure, for mere sound's sake, as the individual may prefer noise or harmony, or in the march of time he may become indifferent to both."[8] While the rule against recognizing a middle name is of general prevalence, it is still, as already stated, subject to a few exceptions. It is repudiated in Maine and Massachusetts.

[1] Co. Litt. 3, a; Rex v. Newman, 1 Ld. Raym. 562.
[2] Edmundson v. State, 17 Ala. 179; Schofield v. Jennings, 68 Ind. 232; Franklin v. Talmadge, 5 Johns. 84; Bratton v. Seymour, 4 Watts, 329; Allen v. Taylor, 26 Vt. 599; King v. Hutchins, 8 Fost. 561; Sullivan v. State, 6 Tex. App. 319; Dilts v. Kinney, 3 Green (N. J.), 130; Keene v. Meade, 3 Pet. 1; Haywood v. State, 47 Miss. 1. See 1 Bishop Crim. Proced., § 683, *et seq.*
[3] McKay v. Speak, 8 Tex. 376,
[4] State v. Manning, 14 Tex. 402.
[5] Erskine v. Davis, 25 Ill. 251.
[6] Alexander v. Wilmorth, 2 Ark. 413.
[7] State v. Martin, 10 Mo. 391.
[8] Isaacs v. Wiley, 12 Vt. 678.

Thus, in the former State, Judge Peters says: "Formerly but one Christian name was known to the law. The omission or insertion of a middle name, or its initial, was regarded as immaterial. Such is probably the law of the Supreme Court of the United States, and of many, if not most, of the State courts in this country at the present day. But there has been a growing dissatisfaction with the doctrine of the ancient cases upon this subject; and in this State (and Massachusetts) the old doctrine must be regarded both by the precedents and practice as overruled;"[9] and it was accordingly held that Henry M. Hawkins could not be taken to mean Henry F. Hawkins. So in Massachusetts, where Charles Jones Hall was enrolled in a company of militia by the name of Charles Hall, it was held that he was not duly enrolled, because Charles and Charles Jones are different names.[10] And where the defendant was indicted as Thomas Perkins, and pleaded in abatement that his name was Thomas Hopkins Perkins, it was held that the indictment was insufficient.[11]

It is undoubtedly a rule of pleading at the common law, that the writ and declaration must set forth accurately both the Christian name and surname of the plaintiff, and also of the defendant.[12] And it is even held, in an English case, that if the person has two baptismal names, and they are transposed, this will make the pleading bad.[13] But a corporation may be declared against by the name by which it is known, without alleging it to be chartered or incorporated, if the description impliedly amounts to an allegation that the defendants are a corporate body.[14] In accordance with the rule just stated, it cannot be inferred that Emily J. is the same person referred to in another part of the indictment as E. J.[15] So it is held that A. O. is no name at all; nor is it any answer that the person is commonly known by those initials; his real name must be given.[16] Where a person's name is unknown, he may be sued by two fictitious names; but *names* must be used for this purpose, and initials will not suffice.[17] But the severity of the ancient rule in this respect is beginning to be relaxed, and the use of mere initials countenanced, in several jurisdictions. Thus, in Kansas, it is said by Valentine, J.: "The reason upon which a different rule was once founded in England has never existed in this State. * * * * The full Christian name is now seldom written anywhere. * * * * Of course the court might for good cause shown, require that the Christian name be written in full. But still, in consideration of the almost universal custom of using the initial letters only of the Christian name, it is our opinion that no written instrument can at the present time be regarded as a nullity simply because the Christian name of some person mentioned therein, has not been written in full."[18] So, where a person is in the habit of using only initials for his Christian name, and is so indicted, and the fact whether he is so known and called is put in issue and proved against him, and the jury convicts him, the appellate court will not interfere.[19] It has also been held that a judgment rendered against a defendant by his surname only, cannot be considered as void; an action may be maintained against him on such judgment, averring his identity.[20] And the court in Massachusetts, while discountenancing the habit of using initials in legal proceedings, holds that where a certificate of mechanic's lien is required to be filed in the registry of deeds, it is no objection to it that the Christian name of the owner of the land is represented in the certificate only by initials.[21] And the omission of the plaintiff's Christian name in the statement of a claim against a decedent's estate, is only matter in abatement, and the objection may be obviated by amendment.[22]

In regard to the allowance of abbreviations of proper names (other than initials), the de-

[9] Dutton v. Simmons, 65 Me. 583.

[10] Commonwealth v. Hall, 3 Pick. 262.

[11] Commonwealth v. Perkins, 1 Pick. 388.

[12] Stephen on Pleading, 302; Hays v. Lanier, 3 Blackf. 322.

[13] Jones v. Macquillin, 5 Durn. & East, 195.

[14] Adams Express Co. v. Hill, 43 Ind. 157; Woolf v. City Steam-Boat Co., 7 C. B. 103; Angell & Ames on Corp., § 649.

[15] Yount v. State, 64 Ind. 443.

[16] Norris v. Graves, 4 Strobh. L. 32.

[17] Frank v. Levie, 5 Rob. (N. Y.) 599.

[18] Ferguson v. Smith, 10 Kans. 402. So in Texas it is held that if a party executes an instrument by signing with the initials of his given name, he may be sued on it in the same manner: Cummings v. Rice, 9 Tex. 527.

[19] City Council v. King, 4 McCord, 487.

[20] Newcomb v. Peck, 17 Vt. 302.

[21] Getchell v. Moran, 124 Mass. 404.

[22] Peden v. King, 30 Ind. 181.

cisions are by no means harmonious, and it is scarcely possible to deduce any practical rules from the few examples to be found in the books. They can only be stated in their order. It is held that if George, so named in the writ, is described in the declaration as Geo., he may take advantage of this variance by plea in abatement; for these are not the same name.[23] Again, May and Mary are two different names, and must be held to signify two distinct persons, in the absence of proof to the contrary.[24] And "while the name of Henry is sometimes corrupted into Harry, yet they are separate and distinct names. We cannot, therefore, hold that they are the same, unless it were shown by averment and proof."[25] On the other hand, it has been held that Mary and Polly may be understood to be the same person, when there are extrinsic circumstances tending to show their identity.[26] And that evidence that the person referred to was called "Wormald" or "Jo," was sufficient in law to warrant the jury in finding that his name was Joseph Wormald.[27] And again, where one entered into a recognizance as Barney, and was sued as Barnabas, being commonly known by either name, the variance was not considered fatal.[28] Finally, the court cannot say judicially that the name "Lawrence" may not designate a female.[29]

There has been a good deal of curious discussion as to whether a single letter, standing alone, must necessarily be regarded as a mere initial, or whether it might not be understood to constitute an entire name by itself; and whether, in the latter event, this property could be attributed to consonants, or must be restricted to vowels. In the case of Regina v. Dale,[30] it was held that "B." and "I. H." might be Christian names, and not merely the initials of them, Campbell, C. J., saying: "I cannot acquiesce in the doctrine which was made in Lomax v. Landells, 6 C. B. 577, that a vowel may be a name, but a consonant cannot. I allow that a vowel may be a Christian name; and why may not a consonant be? Why might not the parents, for a reason good or bad, say that their child should be baptized by the name of B., C., D., F., or H.? I am just informed by a person of most credible authority, that within his own knowledge a person has been baptized by the name of T." So, also, in a Connecticut decision, the court said: "But, as applicable to the present subject, we see no sensible or rational ground for any distinction between a vowel and consonant, and think that either of them may be a name; and that name is denoted by the sound by which it is called or pronounced when it is spoken or uttered audibly as a letter."[31]

But there is an important exception to the rule that a middle initial constitutes no part of a man's name, viz: that it cannot be safely omitted in the docket-record of a judgment or other lien. Thus the Pennsylvania court say: "It is certain that an initial, standing with a name of baptism, is no part of it in pleading; but it follows not that an omission of it is to be disregarded as an index of notice to purchasers."[32] And consequently the omission of a middle initial, or the insertion of a wrong one, in a name in the judgment-index is fatal to the lien of the judgment as against subsequent judgment-creditors.[33] Again, where the Christian names of the partners of a firm, who had given a judgment signed with the firm name, were not set out upon the judgment-docket, on entry of the judgment, it was held without effect as a lien against subsequent purchasers and lien-creditors without notice.[34]

In a very early Massachusetts case it was held, that where father and son have the same name and reside in the same town, the omission of the word "Junior" in a writ against the son is good cause of abatement.[35] But it seems to be abundantly settled, upon the later authorities, that the descriptive title "Junior," or its abbreviation "Jr.," when added to a man's name, constitutes no part of the name.[36] Hence, where the declaration

[23] Wilson v. Shannon, 6 Ark. 196.
[24] Kennedy v. Merriam, 70 Ill. 230.
[25] Garrison v. People, 21 Ill. 538.
[26] Sowle v. Sowle, 10 Pick. 376.
[27] Commonwealth v. O'Baldwin, 103 Mass. 210.
[28] McGregor v. Balch, 17 Vt. 562.
[29] LaMotte v. Archer, 4 E. D. Smith, 46.
[30] 5 English L. & Eq. 360.
[31] Tweedy v. Jarvis, 27 Conn. 42.
[32] Wood v. Reynolds, 7 Watts & S. 406.
[33] Hutchinson's Appeal, 92 Pa. St. 186.
[34] Smith's Appeal, 47 Pa. St. 128. It is to be observed, however, that this doctrine is expressly repudiated in New York: Clute v. Emmerich, 26 Hun, 10.
[35] Zuill v. Bradley, Quincy, 6.
[36] Headley v. Shaw, 39 Ill. 354; People v. Cook, 14

differed from the note offered in evidence only in this particular—the omission of "Jr." —it was held no variance.[37] For, as stated in Prentiss v. Blake,[38] the addition of this title can amount, at most, to presumptive evidence that of two persons bearing the same name the person thus designated is the younger. So that, if land is conveyed to A. B., and there are two persons of that name, father and son, there is no presumption that the father is intended.[39]

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Barb. 259; State v. Weare, 38 N. H. 314; Prentiss v. Blake, 34 Vt. 460; Jameson v. Isaacs, 12 Vt. 611; Cobb v. Lucas, 15 Pick. 7; People v. Collins, 7 Johns. 549.

[37] Headley v. Shaw, 39 Ill. 354.

[38] 34 Vt., 465.

[39] Simpson v. Dix, 131 Mass. 179. *Per contra*: Bate v. Burr, 4 Harr. (Del.) 130. And see Cross v. Martin, 46 Vt. 14.

EVIDENCE—RELEVANCY.

STATE v. O'NEIL.*

Supreme Court of Oregon, December 14, 1885.

CRIMINAL PROCEDURE—[*Homicide—Evidence—Relevancy.*] *Exclusion of Evidence Tending to Decrease Probability of State's Hypothesis.*—On the trial the prosecution gave evidence tending to show that the deceased was killed by the defendant's shooting him with a certain gun; that the defendant procured such gun from his brother, and proceeded with it for a considerable distance along the railroad; that he was seen in possession of the gun at several places between the place where it was claimed he procured it and the place of the homicide. In rebuttal the defense offered to show that, at a place nearer the place of shooting than any testified to by the witnesses for the prosecution, the defendant was seen without having the gun in his visible possession; this evidence was excluded: *Held*, that in the absence of an offer to show that the defendant had parted with the gun, so as to have lost his control over it, the exclusion of such evidence was not error,

Appeal from a judgment of the circuit court. The opinion states the facts.

H. K. Hanna and *T. B. Watson*, for the appellant; *T. B. Kent*, District Attorney, and *W. H. Holmes*, for the respondent.

LORD, J. [Omitting so much of the opinion as relates to a point of practice.]

It is next objected that the court erred in sustaining the objection made by the State, and excluding the answer of the witness John Frazer to this question: "State whether or not you saw the defendant leaving Medford for Ashland on his way from visiting his brother on Jump-off-Jo about the first of October, 1884. If so, state whether he had in his possession a double-barrel shotgun or not." It appears that two days after the murder a double-barrel gun was found in a lot near the place where the murder was perpetrated, which in some respects, at least, answered to the description of a double-barrel gun which the defendant a short time before had procured from his brother at a place called Jump-off-Jo, several miles distant from Ashland. The prosecution had established the fact of his procuring such a gun at his brother's, and of its being seen in his possession at different points on his return from his brother's, coming towards Ashland. The State showed that when the defendant passed Rock point, Gold Hill Station, and Blackwell he was carrying such a gun, and, as it would seem, then making no effort to conceal it.

The object of the question asked was to show that when the defendant was leaving Medford, which was subsequent in point of time, and nearer, and in the line of his route to Ashland, he had not in his possession a double-barrel shot gun, and thus to some extent break the continuity, and repel the inference of the facts sought to be established by the prosecution. This is the claim of the counsel for the defendant, and the inquiry is, whether the question is relevant or not. "Relevancy is that which conduces to the proof of a pertinent hypothesis. Hence it is relevant to put in evidence any circumstances which tend to make the proposition at issue more or less probable:" Whart. Ev., § 20, 21; Whart. Crim. Ev., § 23, 24; In Trull v. True, 33 Me. 367, it was held that "testimony cannot be excluded as irrelevant which would have a tendency, however remote, to establish the probability or improbability of the fact in issue."

It is a fundamental rule of evidence applicable to all trials, that the evidence must be confined to the point in issue. Its sole object is to establish or disprove the disputed facts in issue between the parties. And any evidence not adapted to that end ought not to be received. "Had the case before us," said Cowan, J., "been one of improperly admitting evidence which bore in the least on the general question of guilt or innocence, no doubt a new trial should be granted:" People v. Wiley, 3 Hill (N. Y.), 314. In all such cases "the single question presented to the court is one of relevancy or pertinency, and not of force or value as testimony. No matter how slight the inference may be that can be drawn from a particular fact, it is competent to be considered as an element of the entire concrete of facts from which the deduction is to be made:" Scott v. State, 56 Miss. 287.

If, therefore, the court, in refusing to allow the question asked to be answered, committed such error as affected the rights of the accused, however slight it may have been, the conviction must be set aside, and a new trial granted. The controlling and important inquiry, then, is: was the

*S. C., West Coast Rep., 151.

question excluded relevant? For the better understanding of this inquiry, some preliminary statement is necessary. It appears from the record that there was evidence tending to prove, previous to the murder, that the defendant had maintained improper relations or intimacy with the wife of the deceased, and had made threats against his life; that after the murder a gun was found in a lot near the place where the murder was committed; that the person who had committed the deed had fled by an unfrequented way, leaving the imprint of his boots in the soft earth, which by trial were found to fit the boots worn by the defendant. Upon this state of facts it become important for the state to trace the gun into the hands or possession of the defendant. For this purpose the State proved that a month or more before the murder was committed, the defendant had visited his brother at a place called Jump-off -Jo, some fifty miles distant from Ashland, and while there, procured from him a double-barrel shotgun, which corresponded or answered to the description of the gun found near the place of the murder; and to further corroborate and fix that procurement and possession of the gun by the defendant, the testimony as to the intermediate points on his return was introduced and admitted.

The State had thus established the fact of the possession of the instrument—It had traced the gun into the hands of the defendant, with the power to control it, and it became necessary for the defendant to get rid of that possession unless he could contradict the fact of procurement, or show the gun procured was another or different gun. As nothing of this sort was attempted, it only remained to introduce evidence tending to show that subsequently the defendant had parted with the possession of the gun, and thereby lost control over it, thus rendering improbable the inference sought to be established by the prosecution. And this is precisely, in effect, the contention of counsel for the defendant. In the written brief it is said that to rebut the evidence offered, the object of the evidence rejected was to show that thd defendant was not in possession of the gun—had parted with it. It is not pretended that the evidence sought to be elicited by the question would have tended to contradict the fact of his procurement and possession of the gun as proved by the state, but it is insisted that it tends to prove that at a time subsequently and nearer the place where the murder was committed, the "defendant was not in possession of the gun—had parted with it," and in this way would have tended to rebut the inference of the facts as proved by the State. If this is the effect of the proposed evidence, or the proper inference to be drawn from it, then it was relevant, and its rejection was error which affected the rights of the accused, and the conviction ought to be set aside.

But in my judgment this is not the effect of the evidence proposed to be elicited by the excluded question. It is simply proposed to show that at the time when the witness saw the defendant leaving Medford he did not have in his possession a double-barreled gun, but this by no means implies or justifies the inference that he had disposed of the gun, or parted with its possession so as to lose control over it, or that he was not in fact in the virtual possession of it, only that he was not in the visible possession of the gun at the particular time the witness saw him. From the nature of the case, it is not to be supposed that the defendant was at all times after he had procured the gun in the open, visible possession of it. There would necessarily be many times when this would not nor could be the case, and if he had the murderous design in his heart, which it is claimed the facts indicate, the gun and all traces of it would be purposely out of his immediate or visible possession—but subject to his control—as he neared Ashland, where the deed was to be perpetrated. As the facts stood, to rebut or render less probable the inference arising from the facts as proved by the prosecution, the evidence proposed to be relevant, should have tended in some degree to show that the defendant had parted with, or in some way disposed of, the possession of the gun; or tendered some circumstance, however originating of similar import or effect, which involved the inference of a loss of control or dominion over it. As a circumstance, for the purpose offered, the evidence proposed by the question fell short of the disputed issue, and needed the aid of some additional fact, either to have been previously proved, or to have been followed an offer of subsequent proof, to render it relevant and material.

For instance, if there had been evidence already submitted by the defense tending to show that the defendant, before reaching Medford, or while there, had sold the gun, or in some manner parted with the possession, whereby it passed into other hands, or by reason of the absence of witnesses or other cause, offered to follow up the question asked by some such equivalent proof before the evidence closed, then the evidence proposed by the question would have been relevant, not only as corroborative of the fact that the possession had passed into other hands, but as strengthening its rebutting effect. It is a mistake to suppose, as suggested by counsel, that evidence of the disposal of the gun to another, and the evidence proposed by the question only differs in degree—the latter fails to raise the material inference implied in the former. It seems to belong to that class of evidence, often proposed, which approaches, but does not exactly reach, the boundary line dividing the relevant and irrelevant, but which, particularly in cases of this sort, it is freely admitted it is better and safer to receive than to reject. It is always best in cases of a criminal character, particularly where life is involved, that the court should adopt a liberal rather than a rigorous or technical rule in the receipt of evidence for the

defense. "Whenever there is any doubt of the question," said Baldwin, J., "or rather, whenever the evidence proposed by the defense is not plainly admissible, it is better to let it go in, since, in nine cases out of ten, a single equivocal fact, of doubtful bearing on the case, would have no effect upon the judgment of the jurors, who are usually disposed to pass, and do pass, upon the general merits: People v. Williams, 18 Cal. 194. And this seems to be the uniform language of the authorities. In Mack v. The State, 48 Wis. 287, Taylor, J., in delivering the opinion of the court, said: "Though it be true that the judge, upon the trial of a criminal case, should not permit the time of the court to be wasted in hearing evidence which is entirely disconnected with, and immaterial to the real issues, and which may mislead and confuse the jury, yet, on the other hand, for the furtherance of justice and the protection of the State, a liberal rule should be adopted in the admission of evidence, and no evidence offered by the accused should be rejected when its immateriality is not clearly apparent." And again: "It seems to us that in every aspect of the case it is better for the State, as well as for the accused, that the trial court should adopt a liberal course in the receipt of evidence offered by the defense; and that if the court errs, it should err in liberality rather than in the application of technical and rigorous rules, excluding all evidence which is not clearly seen to be material.

THAYER, J., concurring. The question asked the witness, Frazer, the ruling upon which is claimed to have been erroneous, was the following: "State whether or not you saw the defendant leaving Medford for Ashland on his way from visiting his brother on Jump-off-Jo, about the first of October, 1884; if so, state whether he had in his possession a double-barrel shot gun or not." The question was objected to and the objection was sustained. This court is of the opinion that the Circuit Court could very properly have allowed the witness to have answered the question, as the State had shown the defendant to have had the gun he obtained of his brother at two or three intermediate points between Jump-off-Jo and Medford—that it might be a circumstance tending to show that the defendant did not take the gun on to Ashland on the occasion referred to, but it is not considered that the ruling referred to was a material error. That the defendant procured the gun from his brother, in connection with the proof tending to show that it was the same gun found near the place of the homicide, was a very important circumstance in the case. But that he was seen to have had it at Rock Point, Gold Hill Station, and Blackwell, was comparatively unimportant. That he had the gun when it was last seen in the possession of any one was the fact that made the circumstance important. The defendant had an undoubted right to show that he disposed of the gun at Medford or elsewhere, but the question had no tendency to show that. The witness in his answer to the question, would have had no right to state anything except what he saw, and could, if he had been permitted, only have stated that he did not see the defendant have the gun in his possession at Medford. That would not have proved a disposal of it, nor have been a necessary preliminary inquiry to the making of such proof.

I am inclined to believe that a responsive answer to the question, of the most favorable character would have been quite as damaging as beneficial to the defendant. If the witness had answered that he did not see the defendant have any gun in his possession while at Medford, it still might have been inferred, if it were the same gun before referred to, that he had secreted it during his stay at that place. I cannot see that the ruling upon the objection to the question, conceded it to have been erroneous, could have injured the defendant in the least. It did not controvert the evidence that he borrowed the gun, and of his having had it at the other places. The most that could have been claimed from the evidence, if the witness had answered as suggested, would be that the defendant did not openly carry the gun to Ashland, if he carried it at all. Assuming that the gun found near the spot of the homicide was the same one that the defendant obtained from his brother, made a strong circumstance against him, unless he proved that he had, prior to that time, disposed of it to some other party, and I am unable to discover how the proof offered could have weakened it in any degree. The conclusion of the court that the error was harmless is formed, not from any other evidence in the case, but from the absolute weakness of the proposed evidence viewed in the light of the general facts and circumstances disclosed by the record.

This court is not unmindful of the fact that the defendant was on trial for his life, nor unconscious of its duty to resolve, in so important a matter, every doubt upon the law in his favor. I am quite certain that if the court thought or believed that the evidence offered would, if it had been received, have tended in the least degree to establish the defendant's innocence, or to refute the proof of his guilt, a new trial would be ordered. But the law under which the court is authorized to review adjudications in criminal proceedings provides expressly that it must give judgment without regard to the decision of questions which were in the discretion of the court below, or to technical errors, defects, or exceptions which do not affect the substantial rights of the parties: Crim. Code, § 246. The present case, however, affords a proper occasion to express our emphatic disapproval of the application in criminal cases of a hard and fast rule in determining upon the admission of evidence which it is claimed will tend to the exculpation of the accused, and to discourage, as far as we may, illiberality in the admission of testimony, especially in cases of so grave a character as the one under consideration. No testimony having any bearing

upon the issues involved in the charge or raised at the trial should be excluded. The person accused of an offense, however guilty in fact he may be, is entitled to a fair and impartial trial, and it is the judge in his private character, and not the law, which condemns, when its forms and rules have been disregarded. But this court has only the right and power to correct those errors which affect the substantial rights of the party, and it is because the error complained of herein is not, in the opinion of a majority of the court, of that character that the judgment of the court below must stand.

WALDO, C. J., dissenting. A gun was found near the scene of the murder, with which the murder was supposed to have been committed. The State had the right to show that the gun belonged to the prisoner, or to trace it to his possession. Where a prisoner was seen on the day after the burglary, near the place of the burglary, and tools with which the burglary was supposed to have been committed were found near by shortly afterwards, the prosecution was permitted to show that these tools came from the home of the prisoner, although that home was two hundred miles from the place of the burglary. "Proof that the implements used came from his home was a circumstance very proper to be submitted to the jury in connecting him with the crime;" People v. Larned, 7 N. Y. 452.

In this case to connect the prisoner with the gun the State had introduced evidence to show that about the first of October, 1884, the murder having been committed on the evening of November 20th following the prisoner made a journey from Grave creek, or Jump-off-Jo creek to Ashland, and was seen at three different places on that journey carrying a double-barreled shot-gun, described as resembling that found near the scene of the murder. No question has been made on the sufficiency of the identity of the gun.

The only question here is on the rejection of the evidence offered on behalf of the prisoner to rebut this evidence on the part of the State. The object of the evidence on the part of the State was to trace the gun to the possession of the prisoner at Ashland. An isolated fact of possession at either of the places named could not, of course, be rebutted by evidence that he did not afterwards have the gun at some other place. But that is not this case. The principle of this case is this: J. S. making a journey from A. to G., is seen at B. C. and D., having a gun in his possession, and carrying it with him as he travels. At F. on that journey, he is traveling without the gun. The gun is afterward found at G., and J. S. is accused of using it there to commit a murder. As proof of his possession of the gun, his journey from A. to G. is introduced, and his possession of the gun at B. C. and D. shown. In rebuttal, evidence is offered that on an afterpart of that journey, to-wit, at F., J. S. was traveling without the gun. It may be noted here that it is not shown that J. S., after his arrival at G., on that journey ever after came back to the place where he was last seen with the gun.

To state the case in another way: J. S., on a certain day, is seen near the right bank of the Columbia river, traveling towards a point on the other side, and carrying a gun. A few days afterwards the gun is found on the other side of the river, near the scene of a recent murder. J. S. is arrested for the murder. The State endeavors to connect him with the gun, by showing his possession, as above, beyond the Columbia. In rebuttal J. S. offers to show that he crossed the river on that day and on that journey without the gun.

Now, if it could be certainly shown that J. S. never again after that time crossed and recrossed the river, this evidence would perfectly rebut the evidence on the part of the State. The possibility that he may have returned and brought the gun over at another time, weakens the otherwise conclusive effect of the evidence, but cannot destroy its effect altogether, without the aid of a conclusive presumption that he did return, which would be something new in the law, or, possibly, something old, but unheard of since the time of the Stuarts, of which Mr. Justice Stephens, in his history of the criminal law of England, says: "A criminal trial in those days was not unlike a race between the king and the prisoner, in which the king had a long start, and the prisoner was heavily weighted."

A gun carried by a traveler in an early stage of a continuous journey from one given point to another, it might be supposed, was carried by him to the end. There ought to be a right to rebut this supposition by showing that at a point on the route beyond any point at which he is shown to have been carrying the gun, and before the point of destination was reached, he was pursuing his journey without it. Such evidence in rebuttal is precisely of like character to that of the prosecution.

"It would seem but even-handed justice that if one party should give evidence in proof of some point of his case, of a particular character, not strictly competent in point of law for the purpose for which it was offered, the opposite party should be allowed the benefit of proofs of like character in disproof of the fact in issue:" WOODS, J., in Furbush v. Goodwin, 25 N. H. 448.

In this case the evidence of the State was competent. Much more, then, ought evidence of like character, offered by the defendant to rebut it, have been admitted.

NOTE.—*Evidence must Tend to Prove Issue.*—The most fundamental rule of evidence is that the evidence adduced must be confined to the matter in dispute. Relevancy is the term applied to evidence that tends to prove the issue, and whether evidence is admissible or not, or is relevant, is a question for the court. Mr. Stephen makes relevancy a sole test of admissibility, but in this conclusion he is undoubtedly incorrect. A communication by a client to his legal adviser, would be highly relevant, but none the less inadmissable.[1]

[1] Best Prin. Ev., Chamberlayns Am. Ed. § 251 note.

It is not necessary that the evidence bear directly upon the point in issue. If it constitutes a link in the chain of proof, or tends to prove the issue, it is sufficient, although considered alone it might not justify a verdict.[2] Neither is it essential that its relevancy appear when the evidence is offered. If it will be afterterward rendered material by other evidence it may be admitted. If not subsequently connected with the issue, it may be taken from the consideration of the jury.[3] If the order in which the evidence is admitted is discretionary with the judge, no exception lies from an exercise of such discretion.[4]

Criminal Cases.—More breadth in the introduction of testimony is allowed in criminal than in civil cases. For instance, in criminal cases, the defendant is permitted to offer evidence of good character. This is apparently an exception to the rule requiring the evidence to be confined to the point in issue. Evidence of good character can in no way affect the question as to whether A. did a certain act. The cases go upon the ground that if a strong case is made out against the defendant, evidence of good character will not avail; it is only in doubtful cases where testimony of this sort can properly be introduced.[5] It is said that good character will of itself sometimes create a doubt where none could exist without it.[6]

There is another class of cases where there is an apparent exception to the rule of relevancy; and in these, evidence has been received of facts before and after the principal transaction, and which have no ostensible connection with it. The reasons seem to be that the guilty knowledge or intent is material.[7] Evidence of other crimes which are in no way connected with the one in issue, is excluded, but where the crime charged is so linked with another, that in proving the one it would prove the other also, the rule does not apply.

For instance, where one was accused of larceny, evidence which shows his whereabouts at the time of the larceny, is admissible, although it proves another larceny.[8] In order that the prosecution may introduce evidence of other crimes than that charged, they must in some way be connected with the principal case.[9] Such evidence may be admitted, when it becomes necessary to prove *scienter*, to prove such intent, to show a motive for the commission of the offense; when the two crimes form one transaction and are connected; and where the offense is one of a series, and to make out the offense charged others must also be proven.[10]

Testimony otherwise competent, is not rendered incompetent by reason of its proving an offense other than the one charged in the indictment.[11] So, also, evidence of other receipts of stolen goods from the same thief, knowing them to be stolen, are admissible on the question of intent under an indictment for receiving stolen goods, although it proves the violation of another law.[12] In Shaffner v. State,[13] the court only went so far as to say, that it was necessary to identify the action with the offense, by making it appear that he who committed one act must have done the other also.

Evidence is always admissible to prove a motive for doing an act, if the act is in issue on the evidence, tends to prove a fact in issue;[14] or to prove whether an act was accidental or intentional, to show that it was one of a series of similar occurrences, in each of which the person doing the act was concerned.[15]

Where the question is one of self-defense, the custom of deceased in carrying dangerous weapons, and his reputation for violence are, if known to defendant, facts relevant to the issue.[16] And also if there is a dispute as to who first begun an encounter, evidence of threats made by either party against the other, although unknown to the threatened party, are relevant.[17] Whenever it becomes necessary to prove adultery, evidence may be given of other adulterous acts before and after the act charged to show the adulterous disposition.[18] So, also, in cases of alleged rape, bastardy or indecent assault, the character of plaintiff for chastity is relevant.[19] But it has been held that evidence of particular acts of unchastity is not admissible; it may only be extended to general reputation.[20]

Civil Cases.—In civil cases, the question being whether one did or did not do a certain thing, the fact that the actor is of a particular character, is not in general admissible.[21] Such evidence is only admitted when the

2 Sanders v. Stokes, 30 Ala. 432; Columbus &c. Co. v. Semmes, 27 Ga. 283; Farwell v. Tyler, 5 Io. 535; Richardson v. Milburn, 17 Md. 67; Comstock v. Smith, 20 Mich. 338; Tucker v. Peaslee, 36 N. H. 167; Tams v. Bullitt; 35 Pa. St. 138; Schuchardt v. Allins, 1 Wall 359 Haughey v. Strickler, 2 Watts & S. 411; Jones v. Vanzandt, 2 McLean 596; Belden v. Lamb, 17 Conn. 441; Lake v. Mumford, 4 Sm. & Mar. 312.

3 Harris v. Holmes, 30 Vt. 352; U. S. v. Flowery, 1 Sprague's Dec. 109; Van Buren v. Wells, 19 Wend. 203; Crenshaw v. Davenport, 6 Ala. 390; Abney v. Kingsland, 10 Ala. 355; Yeatman v. Hart, 6 Humph. 375; Mappin v. Aetna Axle Co., 41 Conn. 271.

4 Commonwealth v. Dam, 107 Mass. 210.

5 Comw. v. Webster, 5 Cush. 295; People v. Moett, 23 Hun. 60; Harrington v. State, 19 Ohio St. 264; Armor v. State, 63 Ala. 173; State v. Daley, 53 Vt. 443; Bennett v. State, 8 Humph. 118; Long v. State, 11 Fla. 295.

6 Stephens v. People, 4 Park. Co. 481; People v. Lamb, 2 Keys (N. Y.) 378; Fields v. State, 47 Ala. 603; People v. Ashe, 44 Cal. 288.

7 Bottomly v. U. S. 1 Story, 143; Comw. v. Turner, 3 Met. 19; Rex v. Ball, 1 Camp. 324; Rex v. Roberts, Id. 399; Rex v. Smith, 4 C. & P. 411; People v. Wood, 4 Park. Cr. 681; People v. Hopson, 1 Denio 574; Bronson, C. J.

8 State v. Falwell, 14 Kan. 105; and to same point Phillips v. People, 57 Barb. 353; Rex v. Baker, 2 Mood and R. 53; But see Brown v. Comw., 73 Pa. St. 321.

9 Com. v. Stearns, 10 Met. 256; State v. Smith, 5 Day. 175; Stalker v. State, 9 Conn. 341; Hendricks v. Comw., 5 Leigh. (Va.) 708; Reed v. State, 15 Ohio, 217.

10 Gassenheimer v. State, 52 Ala. 314; Comw. v. Hall, 4 Allen 305; Comw. v. McCarty, 119 Mass. 454; Hall v. State, 40 Ala. 698; St. v. Thomas, 30 La. Am. 600; Wiley v. State, 3 Cold. 362; Somerville v. State, 6 Tex. App. 433; Schaser v. State, 36 Wis. 429.

11 Brown v. State, 26 Ohio St. 176; Kramer v. Comw., 87 Pa. St. 299. See Lightfoot v. People, 26 Mich. 507.

12 Copperman v. People, 56 N. Y. 591; Schindly v. State, 23 Ohio St. 130; Coleman v. People, 58 N. Y. 555.

13 72 Pa. St. 60

14 Comw. v. Hudson, 97 Mass. 565; McKee v. People, 36 N. Y. 113; Kelso v. State, 47 Ala. 573; Boyd v. State, 4 Baxt. (Tenn.) 319; Garber v. State, 4 Cold. 161; Kolb v. Whiteley, 3 G. & J. 138.

15 Steph. Dig. Ev. Art. 12; Reg. v. Cotton, 12 Cox, C. C. 400; Reg. v. Roden, Id. 630; Reg. v. Garner, 3 F. & F. 681; Wood v. U. S. 16 Peters 342.

16 Horback v. State, 43 Tex. 242.

17 Wiggins v. People, 93 U. S. 465; Stokes v. People, 53 N. Y. 174; People v. Scroggins, 37 Cal. 676; Keener v. State, 18 Ga. 194; Campbell v. People, 16 Ill. 18; Holler v. State, 37 Ind. 57; Mimmes v. State, 16 Ohio St. 221.

18 Comw. v. Curtis, 97 Mass. 574; Thayer v. Thayer, 101 Id. 111. (Overruling Comw. v. Thrasher, 11 Gray 450 and Comw. v. Horton, 2 Id. 354, *contra*) See Boody v. Boody, 30 L. J. Pr. & Mat. 23.

19 State v. Reed, 39 Vt. 417; State v. Murray, 63 N. C. 31; Woods v. People, 55 N. Y. 515; Comw. v. Kendall, 113 Mass. 210.

20 State v. Jefferson, 6 Ind. 305; Sherman v. People, 69 Ill. 55.

21 Fowler v. Aetna Life Ins. Co. 6. Conn. 673; Anderson v. Long, 10 S. & R. 55; Jeffries v. Harris, 3 Hawks (N. C.) 105; Battles v. Londenslager 84 Pa. St. 446; Goldsmith v.

nature of the action involves the general character of the party, or goes directly to affect it.[22] For instance, the social standing of the parties is clearly irrelevant in the trial of a breach of contract.[23]

In the trial of civil causes, there are one or two notable exceptions to the rule requiring the evidence to be confined to the matter in dispute, or what at least appears to be an exception. Thus, in matters of science, experts may be called to testify to their opinions not within the knowledge of ordinary witnesses; and the result of experiments based upon facts similar to those in dispute. These rules are well recognized.

The cases are not in harmony upon the point as to whether in an action for libel or slander the character of the plaintiff may be inquired into. The weight of authority is that such evidence may correctly be admitted.[24] And in an action for breach of promise of marriage the rule is the same.[25] Where the mental state of a person is material, evidence of acts similar to the one which is the subject of the action may be admitted if it shows the state of mind of such person. This rule is usually applied to fraudulent transactions. Evidence of other acts of a similar nature are admitted to show the fraudulent intent.[26] Evidence of collateral facts is sometimes admitted, even when not strictly bearing on the case, for the purpose of conforming the testimony of witnesses;[27] although in general they are excluded.[28] In Melhurst v. Collier,[29] the court held, that where a witness for the plaintiff denied the existence of a material fact, and testified that the plaintiff had offered him money to assert its existence, plaintiff was allowed to prove the fact and to disprove the subornation, on the ground that it had become material to the issue. A. G. MCKEAN.

Picard, 27 Ala. 142; Lander v. Seaver, 32 Vt. 114; Thayer v. Boyle, 30 Me. 475; Boardman v. Woodman, 47 N. H. 120; McDonald v. Savoy, 110 Mass. 49; Dudley v. McCluer, 65 Mo. 241.

[22] McCarty v. Leary, 118 Mass. 509; Tenney v. Tuttle, 1 Allen 185; Jacobs v. Duke, 1 E. D. Smith 271; Wright v. McKee, 37 Vt. 161; Lander v. Seever, *supra*; Pratt v. Andrews, 4 Const. 493; Porter v. Seiler, 23 Pa. St. 424; Goldsmith v. Piccard, *supra:* Fowler v. Aetna Fire Ins. Co., *supra;* Anderson v. Long, *supra;* Nash v. Gilkerson, 5 S. & R. 55; Humphrey v. Humphrey, 7 Conn. 116.

[23] Rowland v. Down, 2 Murph (N. C.) 347.

[24] Inman v. Foster, 8 Wend. 602; Bodwell v. Swan, 3 Pick 376; Proctor v. Houghtailing, 37 Mich. 41; Sawyer v. Eipert, 2 Nott & McC. 511; Hally v. Burgess, 9 Ala. 728; Leonard v. Allen, 11 Cush. 241; Schroyer v. Miller, 3 W. Va. 158; Adams v. Lawson, 17 Gratt. 250; where it was held the plaintiff might introduce evidence of good character before the defendant introduced any evidence. But see, Mathews v. Huntley, 9 N. H. 146; Stow v. Converse, 3 Conn. 325; Houghtailing v. Cilderhouse, 1 N. Y. 530. And for a general discussion Odjero Lib & S. 304. N.

[25] Burnett v. Simpkins, 24 Ill. 264; Van Storch v. Griffin 77 Pa. St. 504.

[26] Blake v. Albion Life Ass. Soc., L. R. 4 C. P. Div. 94; Auntingford v. Massey, F. & F. 690; Castle v. Bullard, 23 How. 172; Butler v. Collins, 12 Cal. 457; French v. White, 5 Duer 254; and see Jordan v. Osgood, 109 Mass. 457, where it was held not admissible unless part of fraudulent scheme.

[27] Llewellyn v. Winckworth, 13 M. & W. 598.

[28] Greenl. Ev. § 52.

[29] 5 Q. B. 878.

APPEAL—SECOND APPEAL—EFFECT OF OBITER DICTA — RAILROAD LAND GRANTS—CONSTRUCTION.

BARNEY v. WINONA, ETC. R. R. CO.*

Supreme Court of the United States, March 1, 1886.

1. APPEAL—*Second Appeal—Effect of Obiter Dicta*—That which was decided in a case before the Supreme Court on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition; but this rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision.

2. RAILROAD LAND GRANT TO MINNESOTA—*Act of 1865—Construction—Land Reserved from the Four Sections.*—In the Act of Congress of March 3, 1865, increasing the quantity of lands granted by the Act of 1857 to Minnesota for railroad purposes, the reservation from the four sections was of land previously granted, which was located within them. The previous grant was of lands in place, for it was of alternate sections, designated by odd numbers, for six sections in width on each side of the road, and that portion of it was reserved from the subsequent grant which fell within the four new sections, also in place.

3. SAME—*Rule of Construction of Land-Grant Acts—Granted Lands—Indemnity Lands.*—In the construction of land-grant acts in aid of railroads, there is a well-established distinction observed between "granted lands" and "indemnity lands."

Appeal from the Circuit Court of the United States for the District of Minnesota.

Gordon E. Cole, for appellants; *Thos Wilson*, for appellees.

FIELD, J., delivered the opinion of the court:

This case was before us at the October term, 1874. By an act of congress passed March 3, 1857, a grant of land was made to Minnesota, then a territory, to aid in the construction of certain railroads, including one from Winona, a town on the Mississippi river, to a point on the Big Sioux river, in the present territory of Dakota. 11 St., 195. The grant was of every alternate section, designated by odd numbers, for six sections in width on each side of the road, subject to certain exceptions, not important to be here mentioned, with a right to select indemnity lands within fifteen miles from the line of the road. In May following, the legislature of the territory authorized a company, previously incorporated, to construct and operate this road; and, to aid in its construction, granted to the company the interest and estate, present and prospective, of the territory and future State, in the lands ceded by the act of congress, together with the rights, privileges, and immunities conferred by it.

In 1858 the territory became a State, and was admitted into the Union; and under proceedings for the foreclosure of a mortgage executed by the

*S. C. Reporter, Vol. VI., 654.

company, it became, before March, 1862, reinvested with the estate in the lands and the rights and privileges it had granted. In March, 1862, its legislature passed an act transferring the lands, property, franchishes and privileges, with which it had thus become reinvested, to the Winona & St. Peter Railroad Company, which soon afterwards commenced the construction of the road. By the act of congress of March 3, 1865, the quantity of land granted by the act of 1857 was increased to ten sections per mile, with an enlargement of the limits, within which, indemnity lands might be selected, from fifteen to twenty miles. 13 St. 562. The third section provided that any lands which had been granted to Minnesota for the purpose of aiding in the construction of any railroad which might be located within the limits of the extension, should be deducted from the "full quantity" granted by the act. The full quantity was the four additional sections, and we held that the reservation was merely a legislative declaration of that which the law would have pronounced independently of it, inasmuch as a prior grant of the same property must necessarily be deducted from a subsequent one in which it is included. In October, 1867, the company agreed with the plaintiffs, upon sufficient consideration, to convey to them as many acres of land, previously granted by congress to Minnesota, as it should receive from the State by reason of the construction of its road already made, estimated to be 105 miles, but in fact only 102 miles and a fraction of a mile. This suit was brought to enforce the specific performance of this contract, and the only question between the parties was as to the quantity of land to be conveyed under it.

By the act of 1857, lands were also granted to Minnesota to aid in the construction of the road of the Minnesota, [Minneapolis] & Cedar Valley Railroad Company, afterwards of the Minnesota Central Railroad Company (Laws Minn. Extra Sess. 1857, 20, and Sp. Laws 1863, 137), and that road intersected the road of the defendant between Rochester and Waseca; and lands of that company, at the intersection, were located within the limits of the extension of four sections made by the act of 1865. The court below, however, held that, for the part of the defendant's road constructed after the act of 1865, the plaintiffs were entitled, under their contract, to ten full sections per mile, without any deduction for the lands which were located at the intersection of the road with the road of the Central Valley Railroad Company, and within the grant for the construction of the latter. It was accordingly adjudged that the plaintiffs were entitled, in addition to what had been voluntarily conveyed to them, to a conveyance of 197,111 acres and a fraction of an acre, and a decree to that effect was entered. The case being brought to this court, that decree, at the October term, 1884, was reversed, and the cause sent back to the court below in order that the proper deduction might be made by reason of the interference of the two grants, and the elder grant be deducted from the extension made by the act of 1865, so far as it was located within that extension. 113 U. S. 618, 629, and 5 Sup. Ct. Rep. 606.

In speaking of the two grants, we said of the first one, that of 1857, that it was one by description, that is, or land in place, and not one of quantity. It was of particular parcels of land designated by odd numbers for six sections on each side of the road; that is, of particular parcels of land lying within certain defined lateral limits to the road, and described by numbers on the public surveys. The grant of the four additional sections by the act of 1865 was also a grant of land in place. The intention of congress was to enlarge the first grant from six to ten sections per mile; the additional four to be taken in like manner as the original six, and subject to the same limitations, and to others that had been, or might be prescribed, with a right to select indemnity lands within twenty miles instead of fifteen. The act did not purport to change the character of the first grant, but to increase its quantity. We said, however, that the grant of these additional sections might be regarded as one of quantity—an inadvertence for which the writer of that opinion, who is also the writer of this one, is alone responsible. The statement was not at all material to the decision, which was that a deduction should have been made by reason of the intersection of the two grants, so far as the prior grant was located within the extension.

We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal upon similar facts. The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters, the disposition of which was not required for the decision. When the case went back, the court below seems to have been embarrassed by the erroneous description of the character of the grant of the four additional sections, and to have felt obliged to deduct from the amount originally decreed the number of acres which, prior to March 3, 1865, had passed to Minnesota within the designated limits of the grant to aid the construction of the road of the Minnesota Central Railroad Company, and also the number of acres which had been taken beyond them within the indemnity limits of fifteen miles. In this construction of the reservation made by the third section of the act of 1865, we think the court erred. The reservation from the four sections was of land previously granted which was located within them. The previous grant was of lands in place, for it was of alternate sections, designated by odd numbers, for six sections in width on each side of the road, and that portion of it was reserved from the subsequent grant which fell within the four new sections, also land in place.

In the construction of land-grant acts in aid of railroads there is a well-established distinction ob-

served between "granted lands" and "indemnity lands." The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the act of congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. It is these "granted lands" of the prior grant falling within the six-mile limit that, in our opinion, are reserved, and not the possible indemnity lands which might be subsequently acquired. These granted lands of the prior grant, being in place, could be readily deducted from the four sections, also in place, whenever the roads of the two companies intersected, and the lands fell within the four sections. The quantity thus granted is found by the special masters appointed by the court to be 15,000 acres and 45-100 of an acre. This quantity only, in addition to the lands used for the track of the road of the Winona & St. Peter Railroad Company, and for depots and other purposes necessary and incident to its operation, should therefore be deducted from the number of acres to a conveyance of which from the company the plaintiffs, by the decree of the court below at its December term, 1880, were adjudged to be entitled. The decree will therefore be reversed, and the cause be remanded, with directions to enter a new decree conformable to this opinion; and it is so ordered.

NOTE.—*Res Adjudicata.*—It has become a well-settled rule that an appellate court will not, upon a second hearing of the same cause, review or correct its decision made upon the former appeal. That decision, however erroneous, must govern the case in all subsequent stages of the proceeding; it becomes the law of the case. The reason of the rule of course is, that the decision was an adjudication of the rights of the parties in that case, and was a finality; the court having no power at a subsequent stage of the litigation to review the ruling so made.[1] It is for this reason that even where the rule was established in the case by an intermediate appellate court, from whose action no appeal was taken, the Supreme Court will not, after a re-trial in accordance with such ruling, examine the correctness thereof on appeal to the Supreme Court; the parties having permitted the intermediate appellate court to adjudicate their rights from which judgment, when made, no appeal was taken.[2] And where, upon re-trial in the circuit court, the parties without objection enter upon the examination of issues which had been finally disposed of by the appellate court on previous appeal, it was held that this would not preclude the party from taking advantage of the previous adjudication by the appellate court; "something stronger and of a more solemn character than matters that are sufficient to raise implications or presumptions would be required in order to set the judgment aside."[3] A change in the opinion, or of members of the court, will not affect the question;[4] or the fact that the previous ruling was obviously erroneous; for though "a previous ruling of the appellate court upon a point distinctly made may be only an authority in other cases to be followed and affirmed; or to be modified or overruled according to its intrinsic merits, yet in the case in which it is made, it is more than authority—it is a final adjudication from the consequences of which the court cannot depart, nor the parties relieve themselves."[5] Where the decision is placed upon several distinct grounds, each will govern the future conduct of the cause.[6]

Where the trial court disregards the law of the case as laid down by the appellate court, it is error to be corrected on appeal; the judgment is not void.[7]

Of course the rule applies only to the decision of the court, and not to mere *dicta*.[8] The rule applies to question of law and not of fact.[9] But when the Supreme Court holds that certain evidence is insufficient proof of a fact, that evidence will not be deemed sufficient in that case afterwards.[10] Whenever the questions are in substance the same as those on the previous appeal they will not be re-examined; although the form of the question or the manner of its presentation be different;[11] and it should be remembered that the presumption is that the court considered every fact appearing on the record, whether adverted to in the opinion or not.[12]

The mere direction at the close of the opinion of the court is a mere formality, and does not itself limit the authority of the trial court.[13] And the rule is that where the court reverses and remands the cause without giving specific directions, the case goes back for new trial upon all of the issues, governed, of course, by the ruling of the court;[14] and the parties will be at liberty to introduce other evidence, and may amend their pleading.[15] But there need not be any specific directions, that may be inferred from the decision.[16] Where a specific direction is given to the trial court that direction must be obeyed; if there is any ambiguity in the mandate, it is to be explained by the opinion of the court promulgating it.[17] The mandate is in the nature of a special power of attorney, by which

1 Sibbald v. U. S. 12 Pet. 488.
2 Lackland v. Smith, 75 Mo. 307.
3 Argenti v. San Francisco, 30 Cal. 459.

4 Hawley v. Smith, 45 Ind. 183; Hoffman v. State, 30 Ala. 534; Thomason v. Dill, 34 Ala. 177.
5 Leese v. C ark, 20 Cal. 416; Washington Bridge co. v. Stewart, 3 How. 413; Russell & LaRoque, 13 Ala. 151; Hinely v. Rose, 5 Crauch. 313; Browder v. McArthur, 7 Wheat. 58; The Santa Maria, 10 Wheat. 431; Boyce v. Grundy, 9 Pet. 275; Sibbald v. U. S., 12 Pet. 488, 491; Corning v. Troy Iron works, 15 How. 451; Sign v. Marry, 16 How. 98; Roi ert v. Cooper, 20 How. 467; Sup. v. Kennecott, 94 U. S. 498; Lady Pike, 96 U. S. 461, Clark v. Keith, 106 U. S. 464.
6 Cameron v. Kenfield, 57 Cal. 553
7 Hayne New Trial & App., § 292 p. 878; Walden v. Badley, 9 How. 34.
8 Sneed v. Osburn, 25 Cal. 629; Hayne New Trial and Appeal p. 878.
9 Mitchell v. Davis, 23 Cal. 338; Sneed v. Osborn, 25 Cal. 629, but see *Ex parte* French, 91 U. S. 423; Tuttle v. Garret, 74 Ills. 444; Thompson v. Albert, 15 Md. 285.
10 Lessing v. Page 53 Cal. 142.
11 Kettrige v. Stevens, 23 Cal. 284.
12 Mulford v. Estudillo, 32 Cal. 137.
13 Raim v, Reynolds, 15 Cal. 468.
14 Stearns v. Aguirre, 7 Cal. 448.
15 State v. Newkirk, 49 Mo. 472; State *ex rel* v. St. Louis Cir. Ct. 41 Mo. 574; Kimball v. Temple, 25 Cal. 455; Ryan v. Tomlison, 39 Cal. 645; Phelan v. San Francisco, 9 Cal. 15; Meeks v. R. R., 56 Cal. 513; Dodger v. Gaylord, 52 Ind. 365.
16 Hurck v. Erskine, 50 Mo. 116; Argenti v. San Francisco, 30 Cal. 461; Meyer v. Kohn, 33 Cal. 486; Keller v. Lewis, 56 Cal. 468.
17 West v. Brashear, 14 Pet. 51; Mitchel v. U. S. 15 Pet. 52; See in this connection, R. R. v. Soutter, 2 Wall. 510.

the lower court is given authority and jurisdiction to take such steps as are therein ordered, and therefore beyond the power conferred by the mandate, its action is *coram non judice*.[18] But it is to be remembered that the trial court continues to possess a judicial power over the execution of the judgment, and it may in proper cases, on writ of *coram nobis* enquire into the validity of the judgment on matters *aliunde* the record; or it may, for facts transpiring since the mandate, modify or control the enforcement of the judgment.[19] If the trial court is directed to enter a specific judgment and does not, but enters another, its action is not merely erroneous, but void,[20] for otherwise there might be an infinite number of judgments in the same cause, all of which might be enforced.

An inferior court may be compelled by *mandamus* to proceed according to the mandate of the appellate court, in respect to those things not involving discretion.[21] Or if a subordinate court refuses to comply, the appellate court may enter the judgment and execute it by appropriate process.[22] But the subordinate court must act in accordance with the mandate, and cannot receive newly discovered evidence which might warrant a different judgment;[23] the court is not possessed of the cause to the same extent as if the judgment or proceeding it is directed to take, were by its own original authority.[24] The inferior court can consider only such questions as relate to what the mandate directs shall be done.[25] And it cannot entertain a supplemental answer after receiving the mandate, nor receive evidence under it offered with a view to new issues not within the authority given by the mandate.[26] When the trial court proceeds in accordance with the mandate the appellate court will not examine the record further.[27]

Stare Decisis.—The rule that the previous decisions of the court in other cases will be binding upon subsequent ones is a rule founded upon policy, and is not unbending, and whether that policy demands its application in any instance depends upon whether it is the subversion of what may be the true rule of law, "be necessary to the public interest, and whether so necessary or not is for the court to decide as a matter of legal discretion, whenever the rule is invoked."[28] If rights have grown up and are dependent upon the decision, it should not be overruled, although clearly erroneous.[29] "The authorities agree that where a rule established by a decision or course of decisions has become a rule of property; and it is probable that rights have become vested under it to a considerable extent, it should not be disturbed, although clearly erroneous; but that where the decision is clearly erroneous, and it is improbable that rights have grown up under it to any considerable extent, it should be overruled."[30] The rule *stare decisis* does not apply to *dicta*, nor to points assumed.[31]

G. D. B.

[18] Chouteau v. Allen, 74 Mo. 56.
[19] Davis v. Packard, 8 Pet. 312; South Fork Canal Co. v. Gordon, 2 Abb. U. S. Rep. 479; Ogden v. Larrabee, 70 Ills. 510.
[20] Mulford v. Estudillo, 32 Cal. 139.
[21] High, Extra Leg. Rem. § 255.
[22] Martin v. Hunter, 1 Wheat. 353; Tyler v. Maguire, 17 Wall. 253.
[23] Durant v. Essex Co., 101 U. S. 555.
[24] *Ex parte* Dubuque Pac. R. R. 1 Wall. 69.
[25] Skillern v. May, 6 Cranch. 267; *Ex parte* story, 12 Peters 339; Chaires v. U. S. 3 How. 611; Washington Bridge Co. v. Stewart, 3 How. 413.
[26] *Ex parte* Story, 12 Pet. 339.
[27] Rising v. Carr, 90 Ills. 596; Stewart v. Salamon, 97 U. S. 361; Humphry v. Baker, 103 U. S. 736; Musser v. Brink, 80 Mo. 350; Stacy v. R. R. 32 Vt. 552; Shoyer v. Nichell, 67 Mo. 589.
[28] Hart v. Burnett, 15 Cal. 598.
[29] Higen v. Courtis, 31 Cal. 402; Smith v. McDonald, 42 Cal. 487.
[30] Hayne New Trial and App., § 290 p. 873.
[31] Donner v. Palmer, 31 Cal. 514.

WEEKLY DIGEST OF RECENT CASES.

1. CONTRACTS.—*Several Writings—One Transaction—Construction.*—Where a transaction which includes the making and delivery of bonds, deeds, mortgages, etc., is concluded at the same time, the instruments must be taken together for the purposes of determining the character of the transaction and the intention of the parties; and in the absence of fraud or mistake antecedent or contemporaneous verbal agreements of the parties cannot be received. *Herbst v. Lowe*, S. C. Wis., Feb., 1886, Repr.

2. DEED.—*Stipulations—Conditions—Injunction.*—A stipulation in a deed of a lot of land, if reasonable, prohibiting the erection or use by the grantee of buildings for stores, boarding-houses, hotels, or stables thereon without the consent of the grantor, is enforceable by injunction. *Winnipesaukee, etc. Ass'n. v. Gordon*, S. C. N. H., March 12, 1886, Atl. Rep. 111, 426.

3. ———. *Clause—Contract—Verbal—Heir—Judgment—Revival—Release—Liability—Evidence—Parol Agreement.*—A verbal assurance by a grantor that a clause in the deed, reserving the lien of a judgment owned by said grantor, should never be enforced, in whole or in part, against the grantee, one of the heirs of the defendant in the judgment, on the ground of which the deed was accepted, is a purely voluntary contract, and void in a *scire facias* for revival against the grantee as an heir. A general release, or a release of the particular interest, must be established to relieve the heir from liability. Evidence of a parol agreement that, in consideration of the payment of the purchase money for another piece of land, subject to the same judgment, one of the defendants in the *scire facias* for revival of the judgment was to take the land, and hold it, with the other land already owned, free from the lien of said judgment, if proved, contains all the requisites of a valid general release, and requires submission to the jury. *Codding v. Wood*, S. C. Pa., April 5, 1886, Atl. Rep. III, 455.

4. ———. *Award for Damages—Does not Pass with Deed—Covenant of Warranty.*— After an award of damages for closing a highway had been made

and the road in fact closed, A., the owner of adjoining premises, conveyed the same to B., bounding the lands by the closed road. *Held*, that the right to the award did not pass by the deed. The purchaser knew or was bound to know that the public highway no longer existed, and must be presumed to have bought and fixed the price in view of that fact. A covenant of warranty is commensurate with the grant and is not applicable to an easement not in fact conveyed. *King v. Trustees, etc. Cathedral*, N. Y. Ct. of Appeals, N. Y., April 13, 1886, East. Rep. IV, 721.

5. EVIDENCE.—*Impeaching own Witness — What Party may Show.*—A party cannot impeach his own witness by proof through other witnesses of contradictory statements unless the witness is one whom the law obliges the party to call. A party disappointed in his witness may, to refresh the witness' recollection, ask him if he has not made contradictory statements, but cannot prove such statements by other witnesses. *Hildreth v. Aldrich*, S. C. of R. I., Oct. 17, 1885, East. Rep. IV, 726.

6. EASEMENT.—*Right of Way—Quare Clausum.*—A tract of land bounded east and west by highways was platted into house lots and streets. A., an owner by purchase of several of these lots, brought trespass *quare clausum* against B., who had purchased one of them, for using the platted street in front of the lots of A. and B. as a means of access to a house and lot owned by B., situated on the east side of the east bounding highway, and not on the plat in question. *Held*, that A. was entitled to recover, notwithstanding B. passed over or along his lot on the plat in going to and from his house. *Brightman v. Chapin*, S. C. of R. I., Oct. 24, 1885, East. Rep. IV, 733.

7. EVIDENCE.—*Parol, to Vary Written Agreement —Promissory Note—Want of Consideration—Law Equity—Champerty—Use of Such Defense as Bar to Recovery.*—Evidence whose purpose is to vary and contradict, by an alleged contemporaneous verbal agreement, the contract which the parties had reduced to writing, is inadmissible. As a rule, want of consideration is a defense in an action upon a promissory note; but it is not always a defense that can be made at law. It frequently requires a court of equity to give it effect. The making of a champertous contract between counsel and client cannot be set up in bar of a recovery on the cause of action to which the cause of action relates. *Burnes v. Scott*, S. C. U. S., April 5, 1886, S. C. Rep. VI, 865.

8. ———. *Judicial Notice—Jurisdiction of Courts—Acts Regulating Execution of Laws—Distance from Place of State Government — Time Since Passage of Laws.*—Judicial notice is not taken of purely private concerns, when they are not connected with, or necessarily involved in, a matter of a public nature; but it is otherwise when they are so involved. A court is required to take notice of the extent of its jurisdiction, not only of the subjects placed by law under its cognizance, but of its extent territorially. It should know whether the laws of the territory, which it was appointed to expound, are in operation with reference to a subject brought before it in the regular course of procedure. Where, according to an act in force, the effect of laws to be passed shall touch districts of country and the inhabitants thereof, varying, according to the distance from the seat of government, according to a fixed principle, the court is charged with notice of such act, and its application to the territorial jurisdiction of such court. *Hoyt v. Russell*, S. C. U. S., March 22, 1886, S. C. Rep. VI, 881.

9. EQUITY PRACTICE. — *Facts Found by Special Master Conclusive — Damages Accruing Subsequent to the Bringing of the Bill—Supplementary Pleadings.*—When there is evidence tending to establish the facts found by a special master, they will not be reviewed or revised in the court of chancery, or on appeal in the Supreme Court, unless fraud or corruption is shown. Where damages accrue subsequent to the bringing of the bill, they must be put in issue by supplementary pleadings, in order to have them assessed and included in the decree; and when such damages have been included, the decree will be reversed. *Waterman v. Buck*, S. C. Vt., April 23, 1886, Atl. Rep. III, 505.

10. EVIDENCE.—*Admissions—Negotiations for Settlement.*—The admission of a distinct fact which in itself tends to establish a cause of action or defense is not rendered inadmissible as evidence from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice. But if the admission is of such a nature that the court can see it would not have been made except for the purpose of producing the objects of the negotiation, and under an agreement that could fairly be implied from the circumstances that it was not to be used afterward to the prejudice of the party making it, it is not error for the court to exclude the evidence. *White v. Steamship Co.*, N. Y. Ct. of App., April 13, 1886, East Repr. IV, 765.

11. INSURANCE. — *Life Insurance — Policy Taken upon Life of a Man by One who Meditates Killing Him—Evidence—Like Policies in Other Companies.*—One cannot recover insurance money payable upon the death of a party whose life he has feloniously taken. In an action of such a kind, it is permissible to show that the murderer obtained policies on the life of his victim previously from other companies. *Mutual, etc. Co. v. Armstrong*, S. C. U. S., April 5, 1886, S. C. Repr. VI, 877.

12. MORTGAGE.—*Foreclosure—Sale—Right of Purchaser—Discontinuous Easement—Right of Way.* Continuous easements pass, on the severance of tenements, as appurtenances; but a right of way does not, unless the grantor in the conveyance uses language sufficient to create the easement *de novo*, or because its use is absolutely necessary to the enjoyment of the premises conveyed. *Morgan v. Meath*, S. C. Mich., April 8, 1886, N. W. Rep. 509.

13. MASTER AND SERVANT—*Contract Made on Sunday — Pleading — Action for Wages — Counter-Claim—Trial—Offer to Confess Judgment—Misconduct of Counsel—New Trial.*—Where a contract is entered into on Sunday, between a master and a servant, it is invalid under the Code, § 2781, and no recovery can be had thereon where the legality of the contract is put in issue; but where that issue is not raised by the pleadings, the fact that the contract was entered into on Sunday cannot be taken into consideration. Where a servant brings suit for his wages under a given contract, the master will not be permitted to prove that the

servant left him in hay-harvest; that he could not secure any one in his place; and, as a consequence, lost a considerable amount of hay. The damages are too remote. Under § 2900 of the Code, where a defendant offers to permit judgment to be taken against him for a specified amount, and the offer is not accepted, no mention of it is to be made in the trial; but where such offer is introduced in evidence, and the defendant fails to make objection thereto, he may be considered to have waived his rights under the statute. *Reich v. Bolch*, S. C. Iowa, April 7, 1886; N. W. Rep. 508.

14. ——— ———. *Negligence — Fellow-Servant— Failure by Plaintiff to Prove Fellow-Servant Representative of Employer.*—An employee, suing for injuries received as such, cannot make his employer responsible for the act or neglect of the supervisor of the work who employed him, while admitting that such supervisor was a mere fellow-servant, and not the representative of the employer, unless he prove, at the same time, that such supervisor was not capable as a servant, and that, irrespective of his conduct, and without reliance upon it, plaintiff acted with all possible care and prudence. *District of Columbia v. McElligott*, S. C. U. S. March 29, 1886; S. C. Rep. VI. 884.

15. MORTGAGE—*Effect of Quitclaim Deed by First Mortgage in Possession—Assignment—Discharge.* —Where land is subject to two mortgages, held by different persons, and the first mortgagee is in possession for the purpose of foreclosure, his quitclaim conveyance to a purchaser of the equity of redemption operates as an assignment of the first mortgage, and not a discharge of it; justice requiring it to have that effect. *Green v. Currier*, S. C. N. H. March 12, 1886; Atl. Rep. III. 428.

16. PRACTICE — *Evidence — Witness.*—When a witness is asked to answer a question yes, or no, and he proceeds to answer generally, it is the duty of the counsel, if he desires to object to the answer, to stop the witness when he observes that he is not answering as requested. He cannot lie by and speculate on the chances of first hearing what the witness may testify to, and then, if the testimony is unsatisfactory, move to strike it out. Whether the court will, under such circumstances, strike out the answer, rests in its discretion, which is not reviewable. *People v. Chacon*, N. Y. Ct. of Appeals, N. Y. April 13, 1886; East. Rep. IV. 774.

17. PARTNERSHIP—*One Firm Under Several Names —Assignment for Benefit of Creditors—Passes Property in other State—Partial Assignment is Valid—Preferences—Validity of Assignment—Incidental Benefit to Assignor.*—Where the same persons engage in carrying on the same business in several places, under different firm names, they constitute but one partnership, and the assets of both firms are equally applicable to the payment of all the creditors. A voluntary assignment for the benefit of creditors, which is valid in the State where the owner resides, passes personal property included, the *situs* of which is in other States. § 68 of the general statutes does not prohibit or interfere with the making of partial assignments for the benefit of creditors; so far as such statute is concerned, such assignments are valid. Under such statute a general assignment for the benefit of creditors is not void because preferences to certain creditors are given thereby such preferences only are void. The mere fact that one of the partners making the assignment was also a member of a firm for whose benefit, to a slight extent, the assignment was made, is not sufficient to invalidate the assignment in law, under § 1520 of the general statutes. *Campbell v. Colorado etc. Co.*, S. C. Col., March 1 1886; West C. Rep. 217.

18. REAL ESTATE. — *Repairs — Equitable Lien.* Plaintiff, pursuant to a resolution of the convention of the Protestant Episcopal church in the diocese of Albany, purchased a residence, for the bishop of that diocese, which was afterward conveyed to the defendant in trust for that purpose. After purchasing the premises, the plaintiff, under the direction and solicitation of the defendant's president, caused the premises to be repaired and put in suitable condition for the purpose intended, and the plaintiff advanced the money to make the repairs. While the repairs were in progress the convention, by resolution, directed the defendant to mortgage the premises and take up a then existing mortgage thereon for $5,000, and pay the plaintiff the sum advanced by him for repairs, intending thereby to provide for the expense he had already incurred, as well as those he contemplated in completing the improvements. Pursuant to that resolution the defendant executed a mortgage for $8,500 upon the premises, and after applying the proceeds as directed, there was still left a balance of over $4000 due the plaintiff. In an action to have this sum declared a lien upon the premises, *held*, that plaintiff was entitled to an equitable lien upon the premises for the balance due him for repairs, and a judgment directing a sale of the property, and the application of the proceeds to the payment thereof. *Perry v. Board of Missions*, N. Y. Ct. of Appeals, April 13, 1886. East. Repr. 708.

19. RECEIVERS—*Appointment— Purpose Thereof— Removal—Discretion of Court*—A receiver is appointed to subserve the interests, not alone of the party in respect to whose application the appointment is made, but of all persons interested in the matter commited to his care. The exercise of the power to remove a receiver lies within the discretion of the court, and must depend upon the peculiar circumstances of each case. *First Nat. Bank v. Barnum etc. Co.*, S. C. Mich., April 15, 1886. N. W. Repr. 657.

20. SALE—*Vesting of Title—Delivery—Payment*-In an action involving the title to certain property alleged by the plaintiff to have been sold to her by the defendant, the defendant requested the court to charge the jury that if the contract was for the sale of property, and no time of credit was agreed upon, then it was a cash sale, and no title would vest in the plaintiff until she paid or tendered the money; but the court instructed the jury that if the property was delivered then the title would vest in the purchaser. *Held* error, and that the request should have been complied with. *Turner v. Moore*, S. C. Vt. April 15, 1886. Atl. Rep. III 467.

21. SUBSCRIPTION—*Mutual Promises Binding after Expenditures have been Made.* — Where several mutually agree to pay money, to be expended for a lawful object of common interest to the parties, the promise of each is considered as made in con-

sideration of the promise of the others; and, after expenditures have been made in advancement of the enterprise in consequence of the subscriptions, it is no defense to an action against a delinquent subscriber for the collection of his subscription that the expenditures were made under the direction of a corporation, organized by the associates in conformity with the original plan, of which he did not choose to become a member. *Osborn v. Crosby*, S. C. N. H. March 12, 1886. Atl. Rep. III. 430.

22. SALE—*Stoppage In Transitu—Delivery—Actual or Constructive Possession—Carrier of Goods—Carrier's Lien—Holding Goods for Buyer.*—The right of stoppage *in transitu* exists until the goods are delivered to the buyer, or possession, actual or constructive, is taken by him. The carrier's change of character into that of an agent to keep the goods for the buyer is not inconsistent with his right to retain the goods in his custody till his lien for freight is satisfied. *Hall v. Dimond*, S. C. N. H. March 12, 1886. Atl. Rep. III. 423.

23. SUBROGATION-*President of Corporation—Payment of Mortgage Interest out of Private Funds.*—A president of a corporation who, to preserve the property for the parties he represents, pays the interest due on a mortgage of such property out of his individual fund, is entitled to be subrogated to their rights. *Bush v. Wadsworth*, S. C. Mich. April 8, 1886. N. W. Rep. 532.

24. TRUST—*Resulting—Purchase of Land by Agent.*—Where a person, desiring to purchase a piece of land, employs, by parol, a firm of land agents to negotiate for the purchase of the land for him, and the member of the firm who does the business commences such negotiations, but finally, and in violation of his duties as agent, purchases the property for himself, with his own money, and takes the title thereto in his own name, and afterwards the principal tenders to the agent an amount of money equal to the purchase money, and an additional amount sufficient to compensate the agent for all his services, and also tenders a deed for the land for the agent to execute to the principal, and demands of the agent that he shall execute the same, but the agent refuses, and claims to own the land himself, *held*, under these facts, and by operation of law, that the agent holds the legal title to the land in trust for his principal; that the principal holds the paramount, equitable title thereto, and by keeping his tender good may recover the property in an action in the nature of ejectment; add this, notwithstanding the statute of frauds, and the fact that the employment of the agent was only in parol, and the further facts that the principal did not advance the purchase money, and has never been in the possession of the property, nor made any improvements thereon; that the case is not one of the creation of an express trust, either by parol or in writing, nor one of the express transfer of any interest in real estate either by parol or in writing, but is simply a case of resulting trust, brought into existence by the operation of law upon the facts of the case, and that the case does not come within the statute of frauds and that the authority of the agent, for the purpose for which he was employed, need not be in writing. *Rose v. Hayden*, S. C. Kans. April 9, 1886. Pac. Rep. X. 554.

VENDOR AND VENDEE—*Deed—Reformation—Parol Evidence—Consideration—Agreement—Breach of Contract—Measure of Damages.*—Where a parol agreement was made, under the terms of which a piece of land was to be conveyed to a railroad company in consideration partly of a freight-house, being built on it by the company, in pursuance of which a deed was executed and delivered for the property, the deed is part execution of the contract, and, in *assumpsit* on the agreement for damages for not building, the introduction of evidence of of the agreement is not an attempt to set aside or reform a deed by parol testimony. The measure of damages for the breach of such contracts is not the value of the land, but whatever injury has been inflicted by not getting the consideration for which the bargain was made. *Westchester etc. R. R. Co. v. Broomall*, S. C. Penn. March 1, 1886. Atl. Rep. III. 444.

26. VENDOR AND VENDEE—*Reservation of Timber—Right to Enter and Cut—Cutting of Logs—Replevin—Reservation in Deed—Notice.*—Where land is sold with a reservation of timber, that reservation carries with it the right to enter, cut, and carry away; and where the contract is silent as to the time within which the timber is to be removed, the vendee cannot at any time interfere with the removal, but where a definite time is specified in which the timber is to be removed, what is left thereafter passes to the estate. Where a person has the right to enter and cut logs, he may maintain replevin for logs wrongfully cut by another. A reservation in a former deed is notice of subsisting right, and binding on a subsequent purchaser, even though he takes title by a deed of general warranty. *Wait v. Baldwin*, S. C. Mich. April 15, 1886. N. W. Repr. 687.

27. WITNESS—*Compelling Party to Answer Written Interrogateries—Warehouseman—Demanding Grain—Receipts—Wrongful Disposition of Wheat—Liability of Bank—Bill of Lading — Draft*—It is error in the district court to make an order requiring a party to answer written interrogatories prepared by the opposite party. A demand by the holder of a warehouse or elevator receipt for grain deposited for storing, for the amount called for by the receipt, is good, notwithstanding that, by reason of removal of grain by the warehouseman, there is not enough left in store to answer all the receipts. Y., a warehouseman, having in his warehouse wheat deposited by others for storing, shipped it, without their consent, on the cars for Chicago; took bills of lading, in which the bank of K. was named as consignee; drew his drafts on the parties in Chicago, for whom the wheat was destined; procured the bank to discount them, delivering to it the bills of a lading as security for them. The bank indorsed the bills in bland, and forwarded them, with the drafts, to its correspondent in Chicago, and the latter, on payment of the drafts, delivered the bills of lading to the drawee. *Held*, that this did not render the bank liable, as for a conversion, to the owners of the wheat. *Held*, also, that the agent of the warehouseman, who assists him in so disposing of the wheat, knowing that he is doing it wrongfully, is liable to the owners of the wheat. *Leuthold v. Fairchild*, S. C. Kans. March 31, 1886. N. W. Rep. 503.

28. WILL—*Interpretation — Testator's Intention—Trust—Resulting Trust — Expenditures for Im-*

provements—The interpretation of a will, being the ascertainment of the fact of the testator's intention, is ordinarily determined by the natural weight of competent evidence proving that fact, and not by artificial and technical rules. An interest in land does not pass, by resulting trust, from the owner to one whose money is expended in improving the land. *Bodwell v. Nutter*, S. C. N. H. March 12, 1886. Atl. Rep. III. 421.

29. ———. *Under Influence—Spiritulism.*—Where a testator, otherwise shown to be of sound mind, married B., who was a spiritualistic medium, and there was evidence that she had great influence over him by pretending to be the medium of communication between the testator and his first wife, *held*, that there was evidence in the case upon which the jury might reasonably infer that an alleged will of the testator, in favor of B., was procured to be made through the undue influence and fraud of B. *Baylies v. Spaulding*, S. C. Mass. March 31, 1886. N. E. Repr. 62.

30. ———. *Die Without Lawful Issue — Refers to Death of Legatee Before that of Testator.*—The testator left him surviving, four children, Jane, Hannah, Daniel and Thorn. After the probate of the will, there died first, Thorn, leaving four children, afterward, Daniel Kingsland, the younger died. The will of the testator, after certain specific devises and legacies, provided as follows: "All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath unto my son Daniel Kingsland and to his heirs; but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children, share and share alike." In an action brought by the children and grandchildren of the testator against the widow of Daniel Kingsland, the younger, to recover property, given to her by her husband, claiming that it belonged to them as devisees under testators will, *held*, that Daniel, the younger, took an absolute estate. Under language of the will, the contingency of death was death of the legatee during the life of the testator, and as that did not occur, plaintiffs took nothing under the will. *Leonard v. Kingsland*, N. Y. Ct. Appeals, April 13, 1886. East. Rep. 702.

31. WILL.—*Legacy—Attaching Creditor of Legatee—Allowance to Accountant, when Reviewed.*—An attaching creditor of a legatee has no standing to complain of the manner of distributing a fund or of the allowance of extra commissions to an executor, until it appears that he is entitled to have the fund subjected to the payment of his claim. The action of the court below in the allowance of compensation to accountants will not be reviewed except when error clearly appears. *Morris' Appeal*, S. C. Pa., Pitts. L. J.

32. ———. *Real Estate—When Converted into Personalty by Will.*—A positive and peremptory order, in a will, to a testator's executors, to sell the real estate of the decedent, operates as a conversion of such real estate into personalty from the moment of the testator's death. As such, it must be regarded as passing by the law of the domicile, and is subject to payment of collateral inheritance tax, though situated in another State. A mere discretion in executors to sell their testator's real estate, does not convert such estate into personalty, and if the land be situated in another State it is not subject to collateral inheritance tax. Under a clause in a will leaving it discretionary with the testator's executors to convey land for legacies in case the executors and legatees can agree as to the portions of land which shall be fair equivalents for the legacies, the legatee takes the land as a purchaser and not as a devisee. *Miller v. Commonwealth*, S. C. Pa., January 4, 1886, Pitts. L. J. 333.

33. WITNESS.—*Contract with Deceased Party—How to be Considered and Proved—Executors and Administrators—Proof of Claim.*—In considering a written contract, one of the parties to which has died subsequent to its execution, every presumption must stand in favor of its efficacy until overthrown, and it must be assumed that it can only be overthrown by conduct of the deceased party himself. Meanwhile, the surviving party to the contract is not a competent witness as to matters between himself and the deceased party upon which such deceased party, if still living, could have testified himself. Consideration by the court of facts, upon a claim dissallowed by commissioners below, for a balance alleged to be due under a contract. *Seligman v. Ten Eyck*, S. C. Mich., April 8, 1886, N. W. Rep. 514.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

46. A. owned a mill property in his own name and right, worth $6,000, and upon which there was an outstanding mortgage of $2,000 held by C. A. and his wife, B., in March, 1882, conveyed to D., by warranty deed, the undivided one-half thereof for $3,000, and received the purchase money. In October, 1882, A. and his wife, B., conveyed the other undivided half to H., subject to one-half of the outstanding mortgage. Shortly afterwards he, A., paid one-half the amount of the mortgage (in order to make his title good to D.), but the payment was indorsed by C. as a general credit of that amount. Afterwards C. foreclosed, and the whole mortgaged premises, were bid in by B. the wife of A. Can she hold the title thus acquired as against D., the purchaser of the undivided one-half under a warranty deed, made by her and husband? The husband being insolvent since the conveyance. Cite authorities. W.
Indiana.

QUERIES ANSWERED.

Query No. 1. [22 Cent. L. J. 23.] COMPOSITION WITH CREDITORS—SECRET PREFERENCE.—A., who owes several creditors, offers to pay 25 per cent. of the claims against him, if all his creditors will release him in writing. He applies to C., to whom he is individually indebted, and who also holds a note for $1,000 executed by the firm of A. and B., of which A. is a member. C. declines to execute the release, unless A. and B. will both agree that his consent shall not operate as a release of the firm debt. They make a parol agreement with him to that effect, and on the faith of it C. signs the release. Now, in a suit by C. against the firm of A. and B., B. pleads the release, and C.

sets up in his replication the parol agreement. Query: Is the replication good? Cite authorities.

H. A. BUERK.

Answer—At first blush it might seem that the invalidity of the release arose from fraud, and that, inasmuch, as plaintiff was a party to that fraud, he would not be allowed to aver it against the release, for *nemo ex propria dolo consequitur actionem*. There can be no question as to the right of other creditors, to avoid a release obtained under such circumstances. Bank of Commerce v. Horber, 11 Mo. App. 475. The general rule is that a promise to accept part of a debt in satisfaction of the whole is without consideration, since it was already the debtor's duty to pay the debt and his promise to perform a legal duty affords no new consideration. Cumber v. Wane, Strange R. 426; Price v. Cannon, 3 Mo. 318. But in composition deeds whereby each of several creditors releases a part of his demand, the contract is not simply between debtor and creditor, but the mutual promises of the creditors form the consideration; each is bound because the others are bound. If therefore by reason of some stipulation an advantage accrues to one, in which the others do not have the right to participate, the contract to which the one assented, is not the contract to which the others assented, their assent is wanting, therefore, his is also; for the obligation arises out of mutual assent and promises. I think the replication is good. Sage v. Valentine, 23 Minn., 102; Solinger v. Earle, 82 N. Y., 393. G. D. B.

Query No. 2. [22 Cent. L. J. 23.] WHAT IS A TURF RACE?—A statute of Arkansas provides that "any person who shall lose any money or property at any game or gambling device, or any bet or wager whatever, may recover the same by action against the person winning the same." The above provision is coupled with a ninety days limitation on such action, and with the further provision that, "Nothing in the two preceding sections shall be so construed as to enable any person to recover back any money or property lost on any *turf race*." What is a turf race?

Jonesboro, Ark. COUNTY LAWYER.

Answer.—See Commonwealth v. Wilson, 9 Leigh., 648; Ash v. Lynn, 7 B. & S. 255. D. R.

CORRESPONDENCE.

TABLES OF CASES.

To the Editor of the Central Law Journal:

I earnestly hope that the suggestion of your correspondent in your issue of May 7th, in regard to omitting tables of cases from text books, will not be adopted by authors or publishers. A table of cases is almost as important as an index. When a lawyer is looking up a subject in a test book, he may not know the exact heading under which to find the information he wants; but if he happens to remember the name of a case connected with the subject, he turns to the table of cases, and the citation of the case he remembers will lead him to the right place in the book. This method is often much shorter than wandering through the index and trying several headings before finding the right one. It is also often important to find out quickly the uses an author has made of a case, the various headings under which he has cited it, and this can be best done by a table of cases.

I have always found the earlier American editions of Smith's Leading Cases very difficult to use, by reason of their having no such table. Happily, the last edition has supplied the need.

I confess I cannot see why the table of cases should give the volumes in which the cases are reported. One who uses the table knows beforehand where the case he has in mind is reported. Even if he does not he can turn in a moment to the proper page of the text book to ascertain.

I venture to make one suggestion which I deem important: that in all cases where a book is divided into sections, the printer shall indicate whether the index refers to sections or pages by a suitable word at the top of each page of the index. This would save the hurried lawyer a little time and some annoyance whenever he uses a text-book. "KEYSTONE."

Philadelphia, May 11, 1886.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF TAXATION, Including the Law of Local Assessments. By Thomas M. Cooley, L. L. D., Professor of Constitutional Law and Political Science in the University of Michigan. Second Edition, greatly enlarged. Chicago: Callaghan & Co., Law Book Publishers, 1886.

Ten years ago, the first edition of this work appeared, and during that period it has, in common with other works of the learned author, received the full approval of the profession. A decade, however, makes a considerable difference in the law, as in most other things, and Judge Cooley has found it expedient, not merely to revise, but in effect to re-write this book in preparing it for a second edition. That his work has been thoroughly well done, that errors have been corrected, and additional matter evolved by the courts for ten years past has been inserted and duly assimilated, we might be well assured by the reputation of the author, even if the fact were not, as it is, apparent on every page of the book. The new edition of this work is now, as the first edition was during its lifetime, the standard authority on the law relating to taxation one of the most important of the several sub-divisions of the law. Thousands of new cases have been cited, new matter introduced, and the law of taxation is in this volume brought down to date. The arrangement of the subject in chapters is very good, but we think it would have been an improvement if the subdivisions, which are merely indicated by the use of bold-faced type, had been regularly sectionized and numbered. In the table of cases too, it may be added, the volumes where the cases are to be found are not given. This, as we have said elsewhere in this number, and in another connection, is a defect. If the table of cases is worth making at all, it should be well made, and the entry of each case should show at a single glance where the case is cited, the volume and page where it was reported, and the names of the parties. These matters, however, are among the *minima* of law-book making: in this work is to be found the whole body of the law of taxation, and in its presence, such defects as we have indicated fade into insignificance.

FEDERAL DECISIONS.—Cases argued and determined in the Supreme, Circuit and District Courts of the United States; comprising the opinions of those courts from the time of their organization to the present date, together with extracts from the opinions of the Court of Claims, and the Attorneys Gen-

eral, and the opinions of general importance of the Territorial Courts. Arranged by William G. Myer, author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XIII. DAMAGES—DECREE. St. Louis, Mo: The Gilbert Book Company, 1886.

Within the last three months we have noticed the issuance of two volumes of this highly valuable series and now chronicle the appearance of a third. We can, however, say little more of it than to repeat without qualification the full commendation which we bestowed on its predecessors. The subjects treated in this volume are of great importance: Damages, Death, Debtor and Creditor. The last subject is sub-divided into two parts; the first includes decisions which concern the relation of debtor and creditor generally, and under State laws; the second, these decisions which concern that relation as affected by National bankrupt laws. The latter is not, of course, of such immediate practical use as it would be, if a bankrupt law was now in operation, but as some of the litigation growing out of the last bankrupt law still survives, and there exists a strong probability that in the early future, the bankruptcy system will be re-established, that portion of the volume is of much more value than would appear upon a superficial view of the subject. The reproduction of this body of the law was not only necessary to the symmetry of the work, but will probably soon be found the most immediately and practically useful portion of the whole series. As to the execution of the work in every point of view, we can add nothing to our former commendation.

JETSAM AND FLOTSAM.

SATIRICAL.—A lawyer cannot always trust his witnesses with impunity, any more than they can him. A colored man once sued a neighbor for damages for the loss of his dog, that the neighbor had killed. The defendant wished to prove that the dog was a worthless cur, for whose destruction no damages ought to be recovered.

The attorney for the defence called one, Sam Parker (colored), to the witness stand, whereupon the following conversation ensued:

"Sam, did you know this dog that was killed by Mr. Jones?"

"Yessah. I war pussonally acquainted wid dat dog."

"Well, tell the jury what kind of a dog he was."

"He war a big yaller dog."

"What was he good for?"

"Well, he wouldn't hunt, an' he wouldn't do no gyard duty; he jes' lay round an' eat. Dat make 'em call 'im wat dey did."

"Yes. Well, what did they call him?"

"Well, sah, I don't want ter hurt yer feelin's sah, an' I is mighty sorry you ax me dat, sah, but er fack is, dey call 'im 'Lawyer,' sah."

CORONERS' JURIES.—In an article criticizing the time-honored "Crowner's Quest" the *Irish Law Times* says: "As for the jury, it is generally composed of men, poor but honest, whose presence, if it offers a certain guaranty of publicity, is, as a rule, ludicrously devoid of utility so far as the rendering of a judicial verdict is concerned. These juries, and indeed many coroners' choose by preference some good old-fashioned formula which relieves them of the *onus* of saying exactly what the cause of death really is. A dead body is found; the policeman, as in a case reported a year or two since reports that his breath (?) smelt of drink, and our jury, through the intermediary of an intelligent foreman, and assisted by no less intelligent coroner, returned a verdict of "Death by visitation of God, accelerated by drink." At an inquest held recently in London, the verdict is stated to have been "Death from the bite of a black cat." Such verdicts as these, scarcely present better than that of a coroner's jury in America, which, at an inquest on the clothes of a man whose body had not been found, returned a verdict of "Found empty." Some inducements should be offered to suitable persons to acquire the requisite medico-legal knowledge, without which the whole proceedings may prove abortive, and in every case where death is not obviously the result of an accident or injury, a post-mortem examination should be made *de rigueur*."

AN AFFIDAVIT THAT IS AN AFFIDAVIT—A lawyer in the far west recently filed an affidavit for a continuance on account of his prospective necessary absence. The affidavit concludes as follows:

"Deponent further says that the interests of the plaintiff will in no-wise be jeopardised by the delay for the reason that this deponent is in every way familiar with the financial condition of the defendant, which now is, and for a long time previous to the commencement of this suit has been, a complete wreck, but that by birth and education a scientist and a gentleman, always erect both main and tail, intending at all times to faithfully satisfy and pay all his creditors when able so to do, and very strongly (and rightfully too) demurs to the permitting any wrongful judgment being taken against him without respectful resistance and his day in court, therefore by reason of his pride, his indigency, and consequent impecunious condition is unable to employ any other or more competent defender of his rights, his personal and his inherited family honor, except this deponent—and this deponent will ever pray."

INSANE JUDGES.—We have had occasion once or twice lately to chronicle charges of insanity against judges. We observe now, still another case of the same character. A judge, it is said, becoming insane resigned his office. His resignation was accepted and his successor appointed. Upon recovering his senses he reclaimed his office and the *ad interim* judge is said to have held the following colloquy with the governor:

Judge L.—"I suppose, that judge, C. now that he is restored to his office, will overrule all the decisions rendered by me while I held it."

The Governor—"Certainly; he has become entirely restored to his reason."

IN a recent English book of telegraphic cyphers are many pertaining to the practice of law—four pages of them. "Masculus" means "verdict for the defendant with costs." "Inornate" means "counsel for the defendant has finished calling his witness." "Maledice" means subpœna has not been served, as we cannot find." A very useful one would be "Fuge," addressed to a defendant on bail, and " the verdict will undoubtedly be against you."